No. 87-788

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1987

HMK CORPORATION,

Plaintiff/Petitioner,

v.

JOHN C. WALSEY, et al.,

Defendants/Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

HMK Corporation ("HMK") sought relief under "Civil RICO" for substantial injuries suffered by reason of numerous schemes of criminal misconduct perpetrated by three unrelated groups of persons, over a four-year period, who took advantage of discrete opportunities presented in a major highway planning process, a county land planning process, and seven separate zoning cases, to corrupt the political process on the state and local level, to defraud numerous victims, including HMK, and to extort property from HMK. In addition to HMK, the victims of the fraud included, at various times, depending on the scheme, a county, a state, a hospital, and numerous property owners, some of whom eventually sold their property to HMK. The separate schemes gradually took shape over time as the state moved forward with development of a new highway and as various developers sought numerous zoning changes.

These facts raised a single, but critically important question, to wit:

> "Did HMK's claim for relief plead a pattern within Civil RICO?"

The Fourth Circuit answered the question, "No." This Petition seeks a review of that determination, which reflects a view of "pattern" over which the lower courts are in substantive and fundamental disagreement and which threatens the viability of the criminal and civil administration of RICO, an important federal statute.

LIST OF PARTIES

The Petitioner is HMK Corporation. HMK is organized under the laws of the Commonwealth and has no parent companies, subsidiaries or affiliates.

The Respondents are John C. Walsey, Barry S. Blumberg, Sigma CJ Associates, Petula Associates, Ltd., Stanley R. Balderson, Jr., Richard L. Hedrick, Harold C. King and Jack S. Hodge.

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OPINIONS BELOW

The Court of Appeals opinion is reported at 828 F.2d 1071 (4th Cir. 1987). It is reproduced at App. pp. 1-25. The District Court opinion is reported at 637 F.Supp. 710 (E.D. Va. 1986), and reproduced at App. pp. 26-79.

JURISDICTION

The Court of Appeals judgment was entered on September 17, 1987. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. § 2101(c).

STATUTORY PROVISION INVOLVED

Title 18, United States Code, in relevant part, provides:

§ 1961. Definitions.

As used in this chapter—

> (1) "racketeering activity" means ... any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) ... section 1951 (relating to ... extortion) ... section 2314 ... (relating to interstate transportation of stolen property) ...
>
> x x x
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities.

x x x

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections ... (c) of this section.

§ 1964. Civil remedies.

x x x

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

84 Statutes at Large, 947, provides:

Section 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

STATEMENT OF THE CASE

HMK sought damages under 18 U.S.C. § 1964(c) ("RICO") for its injury by reason of schemes to corrupt eleven governmental decisions dealing with highways, land use, and condemnation. The victims of the schemes included the County of Chesterfield, Virginia, the Commonwealth of Virginia and fifty individuals, who owned property in the area.[1]

Jurisdiction of the district court rested on 18 U.S.C. § 1964; 28 U.S.C. §§ 1331(a) and 1337. The schemes, implemented through six distinct episodes, extended over a four-year period.[2] The schemes affected an undeveloped area of 380 acres of land, in the center of Richmond within the County of

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[1] The identity of the owners was detailed in Appendix C to HMK's Complaint. Appendix C shows that HMK acquired the property of many of these individuals during the defendants' scheme. In addition, at the filing of HMK's Complaint, other individuals, not affiliated with HMK, owned property within the area and one of these owners continues to hold property within the area.

[2] HMK alleged that the activity of the defendants was "presently ongoing."

Chesterfield, Virginia. The schemes were designed to effect a transportation plan, permitted uses and land values.

HMK filed its Complaint on January 6, 1985. HMK described how the activities of four officials, two individuals and two corporations sought to corrupt three enterprises, two of which were governmental. Three motions to dismiss under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56 were filed by the defendants. Before discovery or presentation of evidence, the District Court held a hearing on May 9, 1985, and, ruling from the bench, granted the motions of the defendants; its opinion was filed on June 10, 1986. HMK Corp. v. Walsey, 637 F.Supp. 710 (E.D. Va. 1986). Citing Northern Trust Bank/O'Hare, N.A. v. Inryco, 615 F.Supp. 828 (N.D. Ill. 1985),[3] the District Court held that "the entire course of conduct between HMK and the

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[3] Inryco was subsequently rejected by the Seventh Circuit. Morgan v. Bank of Waukegan 804 F.2d 970, 974-77 (7th Cir. 1986).

defendants ... [did] not constitute a RICO pattern. ... [The] allegations demonstrate only isolated behavior, which, at most, is part of only a single fraudulent scheme." 637 F.Supp. at 712 n.2. The Court of Appeals affirmed on the ground that "HMK's allegations ... [did] not amount to a pattern of racketeering activity ..."[4] Slip op. at 6. As such, "HMK ... [had] not adequately pled a RICO violation." Id. at 6. First, the Court eschewed the adoption of a single test for "pattern". Id. at 8. Second, "pattern" depended on "context."

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[4] The dismissal by the District Court was on the alternate grounds that HMK's claim was barred by a one-year statute of limitations and by doctrines of res judicata and collateral estoppel. This Court has resolved the statute of limitations issue in favor of HMK. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., --- U.S. ---, 107 S.Ct. 2759 (1987). HMK filed an amicus brief in Agency Holding urging the reasoning that was subsequently adopted. Likewise, the Circuit Court of the County of Chesterfield has since ruled that the decision rendered by the Chesterfield Court upon which the District Court relied to preclude HMK's allegations was more limited than the District Court believed. State Highway & Transportation Commissioner v. HMK Corp., Case No. 604-85 (Chesterfield Circuit Court October 9, 1987). The Circuit referred to these grounds as "problematic". Slip op. at 3.

Id. at 9. RICO had to be limited, it felt, to schemes "whose scope and persistence set them above the routine," that is, "every controversy of a particular character" ought not be "within RICO's ambit." Id. at 8-9. Third, HMK's Complaint raised "pattern" in a "mixed commercial and political context." Id. at 10. Fourth, and crucially, the Court mischaracterized HMK's Complaint as involving a routine "development dispute," i.e., a single "dogfight between [two] developers." Id. at 10-11. Ignoring the existence of the governmental misconduct and those episodes not involving land use regulation, the Court followed the District Court: "Two developers ... crossed swords over a unified section of land so that advantages given one hamper[ed] the aspirations of the other.'" Id. at 11 (quoting 637 F.Supp. at 711). The Court collapsed eleven events, of which only half dealt with zoning, into a single zoning dispute between one group of defendants and HMK. The time was reduced to "a reflection of the nature of zoning

approvals." Id. at 12. As such, the Court confused the zoning process with the multiple and distinct matters that were pled. In addition, "the number of predicate acts" was not significant, since they were "a protraction of the administrative process" and "several levels of government." Id. at 12-13. In fact, they involved multi-episodic schemes. Any other holding, the Court feared, would make "every state or local political squabble" a RICO claim--with an adverse impact on federal-state relations. Id. at 15. As such, because "the misconduct that HMK ... alleged in ... [the] development dispute ... [did] not amount to a pattern of racketeering activity," the decision of the District Court was affirmed. Id. at 17.

REASONS FOR GRANTING THE WRIT

1. This Court Must Intervene to Reconcile Conflicting Lower Court Decisions on the Meaning of "Pattern" Within RICO, an Important Federal Statute Authorizing Criminal and Civil Sanctions in the Areas of Organized Crime, Political Corruption,

White-Collar Crime, Terrorism, and Violent Groups Generally.

Today, the definition of a pivotal term--"pattern"--in an important statute, authorizing criminal and civil sanctions, is the subject of conflicting decisions from the circuit courts of appeals. Prosecutors are facing constitutional challeges by defense counsel to the definiteness of "pattern." Private parties need to know when RICO claims for relief are proper. Lower courts are facing motions that raise the "pattern" issue in litigation before them. Prosecutors, defense counsel, litigators, and the lower courts need guidance from this Court.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and violent white-hate or anti-Semitic group prosecu-

tions. Oversight Civil RICO: Hearings Senate Judiciary Committee, 99th Cong., 1st Sess. 106, 109-11 (1985) [testimony of Assistant Attorney General Steven Trott ("Trott")]. In recent years, this Court has turned aside efforts to construe RICO narrowly in two criminal appeals. United States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 465 U.S. 576 (1983).

Private parties did not bring civil RICO suits until 1975. This Court did not face a civil RICO appeal until 1985. Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985). In Sedima, the Court noted, "Congress and the courts [have failed] to develop a meaningful concept of 'pattern' ..."[5]

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[5] "Pattern" was not before the Court in Sedima. 473 U.S. at 500. Since it was neither briefed nor argued, it was not decided. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399 (1821) (Marshall, C. J.). For treatment of the pre-Sedima decisions and a suggestion on how "pattern" ought to be resolved, see Note Reconsideration of Pattern in Civil RICO Offenses, 62 Notre Dame L. Rev. 83 (1986), (cited in Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192 (9th Cir. 1987)). Congress is processing legislation to reform civil RICO. A bill failed of passage in the 99th Congress. 132 Cong. Rec. S16704 (daily ed. Oct.

473 U.S. at 500. The district courts read Sedima as creating "a whole new ball game" in the interpretation RICO. Inryco, 615 F.Supp. at 833. Similarly, circuit courts of appeals took their "cue," and they developed their definitions of "pattern." Slip op. at 7. Chaos is the result. Since Sedima, 58.6% of the decisions have dismissed complaints on motions of defendants. 2 Civil RICO Report (April 14, 1987). In 40.4% of the decisions, the dismissal was on one of the conflicting definitions of "pattern". Id. at 7.

The opinions of the courts cannot be reconciled. Misled by Inryco,[6] the Eighth Circuit adopted a "single scheme" test, i.e., unless multiple schemes are shown, a "pattern" is not

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16, 1986). Its provisions, however, did not treat "pattern." The legislation in the 100th Congress also does not take up the issue. 133 Cong. Rec. S10501 (daily ed. July 22, 1987 (S. 1523); 133 Cong. Rec. H6616 (daily ed. July 23, 1987 (H.R. 2983).

[6] Inryco no longer represents the law of the Seventh Circuit. Lawaetz v. Bank of Nova Scotia, 653 F.Supp. 1278, 1286 (D. Virgin Islands 1987) ("rejected by Morgan"). See supra n.3.

present. Superior Oil v. Fulmer, 785 F.2d 252, 255-58 (8th Cir. 1986). Superior Oil Co. is, however, inconsistent with earlier jurisprudence of the Eleventh Circuit. Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986). It was also not followed by the Third, Ninth, First, Second and Seventh Circuits.[7] The Eighth Circuit remains unconvinced.[8] Madden v. Gluck, 815 F.2d 1163, 1164 n.1 (8th Cir. 1987) (Superior Oil "adhere[d] to" despite Ianniello), cert. denied, 3 Civil RICO Rept. No. 20 at 4 (Oct. 20, 1987). The Fifth Circuit follows a still

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[7] Town of Kearny v. Hudson Meadow Urban Renewal Corp., No. 87-5044 (3d Cir. Sept. 25, 1987); California Architectural Bldg. Prods. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987) (Sneed, J.); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987); United States v. Ianniello, 808 F.2d 184, 189-93 (2d Cir. 1986), and Morgan v. Bank of Waukegan, 804 F.2d 970, 974-77 (7th Cir. 1986) (Cummings, J.).

[8] Among panels of the Eighth Circuit, Superior Oil has been questioned. H.J., Inc. v. Northwestern Bell Telephone Co., No. 87-5121 (8th Cir. Sept. 22, 1987) Slip op. at 4 (McMillian concurring), Slip op. at 5 (Gibson concurring).

different approach. See R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985). Its position was rejected by the Tenth Circuit in Torwest DBC v. Dick, 810 F.2d 925, 928 n.3 (10th Cir. 1987).[9] The Tenth Circuit now follows Superior Oil. Garbade v. Great Divide Mining & Milling Corp., No. 86-2544 (10th Cir. Oct. 15, 1987).

The Fourth Circuit is developing its own approach. Since Sedima, the Circuit has looked for some indication that the "pattern" "characteriz[es] the defendant as a person who regularly commits ... crimes." International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987) [quoting Lipin Enterprises v. Lee, 803 F.2d 322, 324 (7th Cir.

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[9] The holding in R.A.G.S. has also been questioned. Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987) (Higginbotham, J.) ("in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be.").

1986).[10] The Circuit appears to apply a standard of prosecutive discretion and looks at the "matter of criminal dimension and degree" seeking "scope and persistence [that] pose[s] a special threat to social well-being." Zepkin, 812 F.2d at 155. Since it has not articulated principled criteria to distinguish the "ordinary" from the "extraordinary," the Circuit is following a "I-know-it-when-I-see-it" approach. The Circuit is not following the Seventh Circuit's factor-based standard. Compare

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[10] Such an approach re-introduces the "organized crime" limitation discredited in Sedima, 473 U.S. at 495 ("any 'person'--not just mobsters"). Those courts that dismiss civil RICO suits on "pattern" grounds, while acknowledging that Sedima eliminated the "organized crime," limitation are 'turning ... [the Court's] reasoning on its head, ... [for such arguments are] out of line with the tenor of the ... Sedima opinion." Bush Development Corp. v. Harbour Place Associates, 632 F.Supp. 1359, 1366 (E.D. Va. 1986) ("narrow reading of ... pattern ... is, ... similar to the ... requirements rejected ... in Sedima."). The majority opinion in Lipin is no longer the Seventh Circuit's approach. Morgan, 804 F.2d at 975-77. It now seeks, not to characterize the defendant, but his conduct, as the statutory language requires "activity". See, e.g., Tellis v. United States Fidelity & Guaranty Co., 826 F.2d 477, 478-80 (7th Cir. 1986).

Morgan, 804 F.2d at 975-77 with Slip op. at 8. The Circuit's approach is the equivalent of the Eighth and Tenth Circuit's "single scheme" limitation. The "I-know-it-when-I-see-it" approach is impermissible under RICO, which includes not only civil, but also criminal sanctions. The Circuit is ignoring that "pattern" is the same in each type of proceeding. Sedima, 473 U.S. at 489; cf. Northern Securities Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J. dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction"). Criminal defendants are now challenging RICO's constitutionality because of these conflicting and vague judicial glosses on the statute. See, e.g., United States v. Di Gilio, No. 86-340 (D.N.J. Sept. 9, 1987). Accordingly, authoritative guidance from this Court is needed if RICO--criminal and civilly--is to provide "enhanced sanctions and new remedies" for old wrongs. 84 Stat. 922 (1970).

2. HMK's Petition Affords an Excellent Vehicle to Review the Conflicting Lower Court Decisions, Since it Involves Only One Issue and The Facts are Not in Dispute, are Set Out in Great Detail, Include All of the Elements that the Lower Courts have Found Relevant, and Deal with Important Facets of RICO's Administration: Fraud, Corruption, and Federal-State Relations.

HMK's Petition is an excellent vehicle to bring order out of the conflicting opinions.[11] It is doubtful whether postponement of intervention will result in the lower courts working out their differences. The basic arguments have been made, the lines of difference drawn, and the positions

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[11] The Fourth Circuit's decision is inconsistent with decisions of the Third, Ninth, Eleventh, Second, Seventh and Fifth Circuits, each of which found a "pattern". Town of Kearny, supra; Sun Savings & Loan Ass'n, 825 F.2d at 192; Bank of Am. Nat'l Trust & Sav. Ass'n., 782 F.2d at 971; Iannielllo, 808 F.2d at 191-93; Morgan, 804 F.2d at 974-77; and James v. Meinke, 778 F.2d 200, 207 (5th Cir. 1985). It is inconsistent with decisions of the Eighth and Tenth Circuits. Garbade, supra; Superior Oil, 785 F.2d at 255-58.

taken. An authoritative resolution of the conflict is needed.

Only "pattern" is posed in this Petition. The facts are not in dispute. McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980). HMK's Complaint is extraordinarily detailed. It includes appendices, one of which is a chronology set out in 130 pages with 373 paragraphs and 176 exhibits.[12]

Finally, the facts include points relevant to all of the tests for "pattern" formulated by the lower courts. See generally, RICO Revisited: An Advance Seminar on the Latest Techniques in Civil Suits 14-43 (1987) ("RICO Revisited") (relationship, continuity, multiple acts, separate episodes, multiple transactions, ongoing or open-ended activity, separate decisions, separate harms, number of victims, time-frame, multiple schemes, characteristics of the defendants, multiple factors).

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[12] See HMK Corp. 637 F.Supp. at 711 ("The Court cannot do justice to the fine detail with which the parties have described the facts ...")

HMK is prepared to argue that any definition of "pattern" must be faithful to the text of the statute, its legislative history, and its purpose. Such a definition, too, is crucial in the administration of the statute for at least four functions: (1) the definition of criminality; (2) a statement of a claim for relief; (3) the principle of claim preclusion; and (4) the application of the statute of limitations. Any definition of "pattern" must also meet two tests: (1) it ought to work well on the civil and criminal sides of the statute, and (2) it ought to work well in § 1962 (a), (b) and (c).[13] A variety of factors bearing on the activity of the defendant—not his status—must be evaluated in each context of the applica-

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[13] L. Wittgenstein, Philosophical Investigation 20 (2d ed. 1953) ("For a large class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.") (emphasis in original); RICO Revisited at 157 ("Pattern may be used in RICO violation in at least 240 different contexts [3 (sections) X 5 (kinds of enterprises) X 4 (kinds of predicate offenses) X 4 (roles in violations) = 240]).

tion of the statute. Too few decisions of the lower courts have given attention to these considerations. But see, Morgan, 804 F.2d at 975-76. Nothing is wrong with seeing "pattern" as a "standard" not as a "rule," but the "standard" must have content. Here, as well as elsewhere, "precision and certainty" may be of "more importance to the rules of law than their abstract justice." McGruder v. Bank of Washington, 22 U.S. (9 Wheat.) 598, 602 (1824) (Johnson, J.).

Any effort to develop a definition of "pattern" must begin with the language of the statute. Sedima, 473 U.S. at 495 n.13. The statute says "activity." Ianniello, 808 F.2d at 192 n.16 ("(M)ultiple scheme requirement is not grounded in the statutory language ....") It does not say "disputes." The statute "requires" that the "activity" be "patterned." "Pattern" is not defined. Sedima, 473 U.S. at 496 n.14. "Pattern" should be read in its ordinary meaning, but it must be viewed in the context of the entire statute.

Sedima, 473 U.S. at 489, 495, n.13. One definition for all sections and all uses will not work.[14] The requirement of a "pattern" is like a "standard" and not a "rule." Morgan, 804 F.2d at 976; II R. Pound Jurisprudence 124-29 (1959).[15] The legislative history of the statute should be examined. Sedima, 473 U.S. at 486. Ianniello, 808 F.2d at 192 n.16 (no "clear legislative history" mandating multiple schemes). It does not mention "disputes." The legislative history points only to two factors: "relationship" and "continuity." Nothing in the text or legislative history of the statute requires

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[14] While their uses in each context will be different, they will reflect a "family of meanings." L. Wittgenstein, at 36. ("[W]e see a complicated network of similarities overlapping and criss-crossing; sometimes overall similarities, sometimes similarities of detail.")

[15] "Pattern" means "design" or "discernible form." VII The Oxford English Dictionary 565-66 (1933); III The Oxford English Dictionary 315 (1933); ("An arrangement or order of things or activity in abstract senses; order or form discernible in things, actions, ideas, situations, etc. Freq. with of, as pattern of behavior ... and as second element with defining word.") (emphasis in original).

"multiple schemes" for "pattern" or precludes its application to a single "dispute."[16] One act does not make a "pattern"; nor do isolated acts.[17] It is consistent with the text and legislative history to find continuity in any aspect of a violation that relates to the racketeering activity.[18] Since the statute is in Title 18, "act" is best understood in the sense of actus reus. United States v. Bailey, 444 U.S. 394, 415 n.11 (1980). No reason exists to focus on a purely jurisdictional "act," i.e., a mailing. Elliott v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir.

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[16] See, A.B.A., Criminal Justice Section, Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee 36-37 (1985) (common scheme limitation rejected, since it would frustrate the application of RICO to conglomerates of crime).

[17] S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ... The target ... is ... not sporadic activity.")

[18] Iannielllo, 808 F.2d at 190-91; Sun Savings & Loan Ass'n, 825 F.2d at 194 n.5.

1987).[19] Instead, the focus should be on an "act"--the actus reus--that inflicts discrete harm. Morgan, 804 F.2d at 975.[20]

The single dispute test for "pattern" will not work. The point seen by looking at §§ 1962(b) and

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[19] While "pattern" must be read consistently in criminal and civil litigation, the "acts" that constitute the "pattern" may differ. Lipin, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) ("a multiplicity of mailings does not reasonably translate directly into a 'pattern' ..."). It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts such as arson."

[20] For parallel concepts, see United States v. Maul, 806 F.2d 1340, 1342-43 (8th Cir. 1986) [criminal liability under 21 U.S.C. §848 (1982)] ("continuing series of violations" under CCE statute) ("repeated and related series of cocaine smuggling and distribution activities"); Henry v. Farmer City State Bank, 808 F.2d 1228, 1237 (7th Cir. 1986) (municipal liability under 42 U.S.C. § 1983 (1982) ("[A] plaintiff must allege [under Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985)] a specific pattern or series of incidents that support the general allegations of custom or policy ..."); United States v. Iron Workers Local 86, 443 F.2d 544, 551-52 (9th Cir.) ('pattern or practice" prerequisite for an attorney general suit under Title VII: defined as "more than an isolated, sporadic incident, but is repeated routine of a generalized nature") [quoting 110 Cong. Rec. 14270 (1970) (remarks of Sen. Hubert H. Humphrey)], cert. denied, 404 U.S. 984 (1971).

(d). Most courts have concentrated on §1962(c). Superior Oil, 785 F.2d at 255; but see id. at 255 and n.1 [§§ 1962(a), (b), and (c) "share in common" the "pattern" concept]. Suppose that the single dispute limitation were applied to § 1962(b), which deals with the takeover of an enterprise, and which represents the principal purpose of RICO. Russello, 464 U.S. at 28. Should a finding of a "pattern" be precluded where the racketeering activity was engaged in pursuant to a single dispute, then § 1962(b) will have been read out of the statute.[21] This is "absurd". Turkette, 452 U.S. at 587. (White, J.). The takeover of a legitimate business will "normally" require not only the act of takeover, but also a "threat" of

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[21] Ianniello, 808 F.2d at 192, Paul S. Mullin & Assocs., Inc. v. Bassett, 632 F.Supp. 532, 541 (D. Del. 1986) ("[A]n attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts ... One could argue, however, that [no pattern was] involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford.")

continuing criminal activity; otherwise, the business could be reclaimed at any time.[22] Morgan, 804 F.2d at 975 ("To focus excessively on either continuity or relationship alone effectively negates the remaining prong.") Similarly, requiring multiple disputes for "pattern" conflicts with § 1962(d) (conspiracy). A requirement of multiple disputes might defeat a single conspiracy charge; conversely, a showing of a single conspiracy might preclude a finding of multiple disputes for "pattern."

HMK is prepared to argue that the Fourth Circuit made two principal errors. First, after ignoring that multiple perpetrators were involved and that victims other than HMK were at different times injured, it inappropriately generalized a series of separate episodes and turned them into a

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[22] S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ("The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.").

single "development" dispute.[23] As such, it decided a case that HMK never pled. Second, it narrowed RICO's scope out of a laudable, but inapplicable concern with federal-state relations. In fact, Congress specifically focused RICO on "fraud and corruption." 84 Stat. 922 (1970); Blakey, The RICO Civil Fraud Action in Context, 58 Notre Dame L. Rev. 237, 249-80 (1982). Fraud and corruption are two of four major groups of RICO's predicate offenses. Id. at 300-06.[24] Congress was

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[23] See Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987) (Higginbotham, J.) ("... semantical game of generalizing the illegal objective, such as, suggesting ... that a series of drug transactions are only part of the single offense of drug distribution. There are several discrete criminal events in such cases. Such a generalized objective is indistinguishable from the very criminal enterprise the Act was plainly intended to reach.")

[24] See The Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 191 (1967), on whose studies RICO was based:

> Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than corruption of the prohibition era ... And as government regulation expands into more and more

aware of RICO's overlap with federal and state crimes and civil claims for relief.[25] If overlap were not foreseen, no need existed to include the No Supersession Clause. The precise fears expressed by the Circuit were vigorously voiced, but overridden in the legislative debates.[26]

> areas of private and business activity, the power to corrupt likewise affords the corrupter more control over matters affecting the everyday life of each citizen.
>
> Contrast, for example, the way governmental action in contract procurement or zoning functions today with the way it functioned only a few years ago. The potential harm of corruption is greater today if only because the scope of governmental activity is greater.

[25] 84 Stat. 947 (1970) ("Nothing in ... [RICO] shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for on this title.")

[26] Turkette, 452 U.S. at 586-87 (White, J.) (citing United States v. Culbert, 435 U.S. 371, 379-80 (1978) (Marshall, J.) ("In the face of these objections, Congress nonetheless proceeded to enact the measure... There is no argument that Congress acted beyond its power ... That being the case, the courts are without authority to restrict the application of the statute.")

Accordingly, no court ought now reweigh the "balance" between "opposing policy arguments," Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978), (Stevens, J.), particularly when Congress has specifically mandated the statute's "liberal" construction. 84 Stat. 947 (1970). Absent an issue of constitutionality, that ought to end the matter. Turkette, 452 U.S. at 587. Civil RICO must be read as Congress drafted it; if necessary, its "correction must lie with Congress." Sedima, 473 U.S. at 499 (White, J.). No indication exists that Congress is unable to play its role under the Constitution.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Fourth Circuit.

Dated: October 30, 1987.

Respectfully submitted,

HMK CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1987 a true and accurate copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit has been mailed to: Charles F. Witthoefft, Esquire, Hirschler, Fleischer, Weinburg, Cox and Allen, P. O. Box 1-Q, Richmond, Virginia 23202; Steven L. Micas, Esquire, County Attorney, Chesterfield Administration Building, Room 503, Chesterfield, Virginia 23832; James T. Moore, III, Esquire, Office of The Attorney General, 101 North 8th Street, Richmond, Virginia 23219.

James G. Harrison

James G. Harrison

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3582

HMK CORPORATION,
a Virginia Corporation,
Plaintiff - Appellant,

versus

JOHN C. WALSEY;
BARRY S. BLUMBERG;
SIGMA CJ ASSOCIATES,
a Virginia limited partnership;
PETULA ASSOCIATES, LTD.,
an Iowa corporation;
JOHN OR JANE DOE ONE THROUGH TEN,
persons unknown or as yet unidentified who were employed by or associated with or were predecessors or successors in interest to JOHN C. WALSEY, BARRY S. BLUMBERG, SIGMA CJ ASSOCIATES and/or PETULA ASSOCIATES, LTD., or who were persons employed by, or associated with the enterprises identified herein as THE BOULDERS and who were knowing and willing participants, directly or indirectly, in the conduct of such affair;
RICHARD L. HEDRICK;
STANLEY R. BALDERSON, JR.;
JOHN OR JANE DOE ELEVEN THROUGH TWENTY,
persons unknown or as yet unidentified who were persons employed by, or associated with the enterprise identified herein as CHESTERFIELD COUNTY PLANNING DEPARTMENT and who were knowing and willing participants, directly or indirectly, in the conduct of such enterprise's affairs;
HAROLD C. KING;

JACK S. HODGE;
JOHN OR JANE DOE TWENTY-ONE THROUGH THIRTY,
persons unknown or as yet unidentified who were persons employed by, or associated with the enterprise identified herein as VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION and who were knowing and willing participants, directly or indirectly, in the conduct of such enterprise's affairs

Defendants - Appellees,

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge. (CA-86-12-R).

Argued: February 2, 1987
Decided: September 17, 1987

Before HALL, PHILLIPS, and WILKINSON, Circuit Judges.

George Robert Blakey (Notre Dame Law School; James G. Harrison; Lawrence D. Diehl; Ray P. Lupold, III; Marks, Stokes & Harrison, P.C. on brief) for Appellant; Steven L. Micas, County Attorney (Jeffrey L. Mincks, Senior Assistant County Attorney on brief); Charles F. Witthoefft (Michael P. Falzone; Hirschler, Fleischer, Weinberg, Cox & Allen; Edward E. Willey, Jr.; Willey & Hall, P.C.; James T. Moore, Senior Assistant Attorney General; John J. Beall, Jr., Senior Assistant Attorney General; Caroline L. Lockerby, Assistant Attorney General on brief) for Appellees.

WILKINSON, Circuit Judge:

HMK Corporation, the plaintiff-appellant in this case, bought property on which it intended to build a large mixed use development. The Boulders Development, controlled by defendant-appellees John C. Walsey, et al., borders HMK's property. HMK alleges that the owners of the Boulders Development misled officials of Chesterfield County, Virginia, and the state Department of Highways and Transportation, thereby subverting the county's planning process. The result of this subversion, according to HMK, is that the defendants gained a windfall at HMK's expense. Based on these allegations, HMK sued the owners of Boulders under civil RICO, 18 U.S.C. § 1964(c). The district court granted summary judgment to the defendants on several grounds. We do not resolve the problematic grounds addressed by the district court, however, because we hold that HMK has failed to allege a

"pattern of racketeering activity" as required by the RICO statute.

I.

The HMK property and the Boulders property are located in the "Jahnke-Chippenham Development Area" of Chesterfield County. This area is bounded on the east by Chippenham Parkway, on the north by the Southern Railway, on the south by Midlothian Turnpike and the Beaufont Mall shopping center, and on the west by residences. Both developers proposed to develop their properties for a number of purposes, including office space, retail stores, apartments, and hotels. The County approved both the HMK and the Boulders development proposals with some modifications and conditions.

This is the eighth lawsuit in which HMK challenges the legality of decisions made by Chesterfield County affecting HMK's property and the adjacent Boulders property. In addition to six lawsuits in state court, HMK has earlier sued

in federal district court. HMK Corp. v. County of Chesterfield, 616 F.Supp. 667 (E.D. Va. 1985). In the present lawsuit, HMK alleges that the defendants and their co-conspirators defrauded the state and local government into granting the Boulders Development numerous benefits and saddling HMK with numerous burdens. These governmental decisions applied mainly to zoning and the related issues of condemnation and highway placement.

In their complaint and its appendices, appellants detail activities on the part of Boulders that allegedly constitute Boulders' scheme to defraud. Appellants content that this fraudulent scheme consisted of several episodes of racketeering. These episodes span a period of four years. They include a series of misrepresentations, false statements, half-truths, and omissions to neighborhood residents, the county planning board, the Virginia Department of Highways and Transportation, and other state and

local government officials. HMK alleges that through these fraudulent means Boulders sought to (1) secure enhanced zoning for the Boulders property, (2) keep the enhanced zoning while avoiding highway expenses by substituting access across HMK's land for the proposed "flyover" access to Chippenham Parkway, (3) obtain additional development capacity for the Boulders property, (4) obtain access across HMK's land by using threats of condemnation to extort a right-of-way from HMK, (5) delay the HMK development to shift the costs of constructing a highway extension to HMK, and (6) limit the zoning awarded to HMK, thereby placing HMK in an inferior position.

HMK argues that by supplying false or misleading information to the government and the public, Boulders committed multiple acts of mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, transportation fraud in violation of 18 U.S.C. § 2314, and extortion in violation of 18 U.S.C. § 1951.

Because the RICO statute defines "racketeering activity" to include all these offenses, see 18 U.S.C. § 1961(1), HMK argues that the actions of the defendants support numerous claims for treble damages under RICO.

Thus, HMK filed a second lawsuit in federal court. Specifically, HMK pled a violation of 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

HMK also pled a violation of § 1962(d), which makes unlawful any conspiracy to violate RICO.

The district court granted the defendants' motion for summary judgment. HMK Corp. v. Walsey, 637 F.Supp. 710 (E.D. Va. 1986) The court ruled that most of the plaintiff's claims were barred for two reasons: first, they had been or could have been raised in the prior

litigation, and second, they were time-barred by the state statute of limitations. The court also ruled that the claims that remained must be dismissed because they did not amount to a "pattern of racketeering activity." In reviewing HMK's appeal, we do not reach the issues of res judicata or the statute of limitations.[1] We hold instead that HMK's allegations in their entirety do not amount to a pattern of racketeering

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[1] A recent Supreme Court decision invalidates the district court's holding that HMK's action is time-barred by the Virginia statute of limitations. After the district court rendered its decision in this case, the Supreme Court heard argument on and decided the question of the appropriate statute of limitations to apply to RICO civil enforcement actions. In Agency Holding Corp. v. Malley-Duff & Associates, Inc., 107 S.Ct. 2759 (1987), the court held that the four year federal statute of limitations applicable to Clayton Act actions was the appropriate limitations period for civil RICO actions. Id. at 2767. The Supreme Court's decision renders invalid the district court's application of Virginia's one-year "catch-all" limitations period of civil RICO actions.

HMK filed its complaint in this case on January 6, 1986. The activity and injuries alleged by HMK occurred within the previous four years. Therefore, HMK's action is not time-barred.

activity, and hence that HMK has not adequately pled a RICO violation.

II.

This circuit recently addressed the question of when a pattern of racketeering activity exists in a strictly commercial context. International Data Bank v. Zepkin, 812 F.2d 149 (4th Cir. 1987). That case drew upon the Supreme Court's discussion of the RICO pattern requirement in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985). In the present case, we address the question of when a RICO pattern exists in a mixed commercial and political context.[2]

In Sedima, the Court suggested that "[t]he 'extraordinary' uses to which civil RICO has been

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[2] As a preliminary matter, we note that HMK has identified the Chesterfield County Planning Department and the Virginia Department of Highways and Transportation as the enterprises some of the defendants are alleged to have been employed by or associated with. The word "enterprise" in § 1962(c) has been broadly construed to encompass units of government as well as commercial entities. See United States v. Long, 651 F.2d 239, 240-41 (4th Cir. 1981).

put" resulted partly from "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" 473 U.S. at 500. The Court also reviewed the legislative history of RICO in a footnote, intimating that RICO did not target the isolated offender and that the word "pattern" in the statute means more than sporadic instances of criminal activity. Id. at 496 n.14.

Lower courts responded to the Supreme Court's cue with differing interpretations of the pattern requirement. The Eighth Circuit held that several related instances of mail or wire fraud in pursuit of one continuing fraudulent scheme cannot amount to a pattern. See Superior Oil v. Fulmer, 785 F.2d 252 (8th Cir. 1986). The Second and Eleventh Circuits have continued to emphasize the number of predicate offenses. United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986); Bank of America v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986). The Seventh Circuit held that the existence of a pattern must be

determined with regard to all the circumstances of a case, rather than an isolated factor or set of factors. Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986).

Our decision in Zepkin elaborated a case-by-case standard akin to that announced by the Seventh Circuit in Morgan. Under this standard, the court looks to the "criminal dimension and degree" of the alleged misconduct. Zepkin, 812 F.2d at 155. The misconduct at issue in Zepkin, a securities fraud, was held to constitute "a single, limited scheme" and hence was not a pattern of racketeering activity. Id.

The existence of a pattern thus depends on context, particularly on the nature of the underlying offenses. Attention to the nature of the underlying offenses is necessary because the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine. In Zepkin we examined the special characteristics of securi-

ties fraud in determining whether a pattern existed:

> Without attempting an all-embracing definition of the pattern requirement, we believe that a single, limited fraudulent scheme, such as the misleading prospectus in this case, is not of itself sufficient to satisfy § 1961(5). Nor do we find 'a pattern' in the fact that one allegedly misleading prospectus reached the hands of ten investors. If the commission of two or more 'acts' to perpetrate a single fraud were held to satisfy the RICO statute, then every fraud would constitute 'a pattern of racketeering activity.' It will be the unusual fraud that does not enlist the mails and wires in its service at least twice. Such an interpretation would thus eliminate the pattern requirement altogether.

812 F.2d at 154-55.

The same focus on context is consistent with the approach taken by the Seventh Circuit in Lipin Enterprises v. Lee, 803 F.2d 322 (7th Cir. 1986). The Seventh Circuit's later opinion in Morgan described how the analysis of the pattern requirement in Lipin Enterprises hinged on the

characteristics of the dispute, which involved a stock acquisition, and how the pattern requirement could not be interpreted in a manner that would bring every controversy of a particular character within RICO's ambit:

> In Lipin, the plaintiff alleged that the defendants defrauded him as part of a single acquisition of over $960,000 worth of stock. It is true that plaintiff was able to point to multiple predicate acts: a false statement made during negotiations for the sale, false financial statements, [and] a false opinion letter from the attorneys .... The existence of multiple predicate acts in Lipin, however, is only because the acquisition of stock in this context is a complicated transaction that requires many separate statements from a variety of persons: financial statements from the accountants, opinions from the lawyers, oral statements from the parties negotiating the sale, and so forth.

Morgan, 804 F.2d at 976.

III.

In the present case, we must look to the nature of the mixed commercial and political context of a development dispute. One charac-

teristic of such disputes is that they typically require the involvement of many governmental decisionmakers at various stages of the approval process. It therefore cannot be sufficient just to point to multiple predicate acts in furtherance of a scheme to influence a development dispute; otherwise, every such dispute could lead to a cause of action under RICO.

Plaintiff HMK, like the plaintiff in Lipin, supra, has alleged many predicate acts of fraud. HMK's complaint is accompanied by a 129-page appendix that gives a detailed account of the defendants' alleged scheme to obtain favorable decisions from Chesterfield County in this development dispute. The presence of numerous predicate acts, however, arises from the complexity of political processes in general, and from those that govern land development in particular.

Virginia law specifies the procedural requirements that must be satisfied in order to amend zoning regulations and classifications.

Once a property owner petitions the local governing body or planning commission for a reclassification, the zoning statute provides that before the governing body adopts or approves the proposed amendment, it must be reviewed by the local planning commission. Both bodies must provide public notice and hold public hearings. Once action has been taken on the proposal, parties wishing to contest the decision may seek review in the state circuit court. Va. Code Ann. §§ 15.1-491, 15.1-493 (1950); see Vinton v. Falcun Corp., 226 Va. 62, 65-66, 306 S.E.2d 867, 869 (1983). Zoning decisions are complex and require consideration of numerous, important, and often competing, interests and concerns. Local planners and legislators must consider such diverse factors as congestion on public streets, adequacy of police and fire protection, adequacy of transportation, sewage facilities, and water, economic development and employment opportunities, and preservation of historic areas and

agricultural and forest lands. See Va. Code Ann. § 15.1-489 (1950). Such considerations necessarily require the participation of numerous agencies and organizations.

Nothing in HMK's allegations sets this development dispute above any other dogfight between developers. The district court placed this lawsuit in its proper perspective: "Although the parties have filed voluminous briefs and exhibits detailing the history of this case, the Court finds the case extraordinarily simple. Two developers have crossed swords over a unified section of land so that advantages given one hamper the aspirations of the other." HMK Corp., 637 F.Supp. at 711. The fact that a developer must seek multiple permits and approvals does not bring every such controversy within the ambit of RICO. Here the allegations pertain merely to the allocation of burdens and benefits in the development of two adjoining properties. HMK does not allege that the

defendants have previously interfered in the county planning process before this development dispute began or that they have done so again in the period since.

In addition to the number of predicate acts, HMK also points to the span of time that the scheme covered--a space of more than four years. Yet the passage of time, like the complexity of the decisionmaking process, is more a reflection of the nature of zoning approvals rather than of the distinctively pervasive nature of the defendants' scheme. In a private, commercial context, the fact that a scheme spans many years might constitute powerful support for the finding of a pattern of racketeering activity. In a mixed commercial and political context such as this one, where interference in the political process is an important part of the alleged scheme, the passage of time may not have comparable significance.

Public bodies often proceed deliberately. The process of zoning approval often involves multiple hearings and opportunity for public comment. These hearings serve to inform public officials, provide a forum for public opinion, and permit landowners adversely affected by the proposed changes to voice their opposition. See 1 R. Anderson, American Law of Zoning 235-37 (3d ed. 1986). This inevitably leads to a protraction of the administrative process. But such delay is seen as a worthwhile price for the benefits of due process and accurate decision-making. An ordinary rezoning decision, not to mention decisions involving the location of roadways, housing projects, shopping centers, or office complexes, always has the potential to generate intense public opposition, to implicate several levels of government, and to take time to resolve. We obviously do not intimate that a RICO pattern is impossible in such circumstances. The element of "continuity" necessary for a

pattern of racketeering activity under RICO cannot, however, be viewed in a vacuum and apart from the inherent characteristics of the decisionmaking process.

Hence, neither the number of predicate acts nor the span of time elevates the alleged scheme in this case to a pattern of racketeering activity under RICO. The gravamen of HMK's complaint is that its opponents deceived various public bodies to obtain favorable land use decisions on the Jahnke-Chippenham tract. Although we hold that no pattern exists in the present case, we want to make clear that the pattern requirement certainly does not bar <u>all</u> RICO claims arising in the zoning context. Without attempting to rule on cases that are not before us, we note that a plaintiff who alleged pervasive involvement by a developer in the political process through widespread racketeering activity could indeed meet the pattern requirement. Allowing a RICO claim in more routine situations,

where a loser in the political arena simply alleges misrepresentations made by the victor, "would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." Zepkin, 812 F.2d at 155.

IV.

In enacting RICO, Congress did not intend to preempt and federalize the field of state business law. Since the federal cause of action does converge, however, with state actions that comprise predicate acts on which RICO is based, some overlap and displacement of state law is inevitable. To recognize a pattern of racketeering activity under these facts, however, would work a wholesale displacement of state authority that Congress never intended.

Congress provided strong measures to ensure compliance with RICO. In addition to the criminal penalties of imprisonment, fines, and

forfeitures in § 1963, Congress also provided strong incentives to civil enforcement. Section 1964(c) permits persons injured in their business or property by a RICO violation to recover treble damages and costs, including a reasonable attorney's fee. These strong incentives to civil enforcement carry with them the concomitant danger that traditional state causes of action aimed at rectifying individual instances of commercial misconduct will be relegated to a position of secondary importance. Such familiar state causes of action as common law misrepresentations and fraud, unfair trade practices, and wrongful franchise termination, not to mention the general run of commercial and contractual disputes, could be eclipsed or resolved primarily as pendent claims in federal court. To secure access to the federal courts and to recover treble damages and attorney's fees under RICO, litigants may attempt to recast such single, isolated schemes as a "pattern of racketeering

activity." See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 504-05 (1984) (Marshall, J., dissenting). To permit plaintiffs injured in such schemes to bring their claims under RICO would consign state law to unprecedented federal oversight irrespective of the parties' citizenship, and would deprive the states of jurisdiction over these local controversies in a way Congress never intended. Congress chose the "pattern requirement" of § 1962(a) as the mechanism by which "ordinary claims of fraud best left to 'the sate common law of fraud'" are distinguished from those activities of such a "criminal dimension and degree" as to warrant the extraordinary remedies of RICO. Zepkin, 812 F.2d at 155.

In a mixed commercial-political controversy such as this one, vitiation of congressional intent would bring additional adverse consequences. Permitting litigants to sue under RICO after every loss in the legislative arena, based

on allegedly fraudulent conduct by the victors, would impinge upon the separation of powers. Permitting a federal suit for fraud in every state or local political squabble would also impinge on the values of federalism to a far greater extent than the Supreme Court has previously allowed.

These values would be affected in important ways. First, such lawsuits would require federal courts to determine whether fraudulent activity was the cause of the local decision for which plaintiff seeks damages. Hence, courts would often have to discount the presumptively legitimate purpose of the decision of a local governing body and attempt to divine its "actual" purpose. Such inquiry into local land use decisions is, of course, required to determine whether stated purposes serve as pretexts for racially invidious intent, but the Supreme Court has noted that inquiries into legislative purpose are otherwise disfavored. Arlington Heights v. Metropolitan

Housing Corp., 429 U.S. 252, 265 (1977).

Second, such lawsuits would undermine the finality of legislative decisions. If the losers in every commercial dispute over zoning could routinely sue their opponents in federal court for fraud, RICO would effect the wholesale transfer of that most basic of local controversies into a federal forum. That result would implicate many of the concerns expressed by this circuit in Hutchinson v. Miller, 797 F.2d 1279, 1285-87 (4th Cir. 1986). In that case, we held that the losing candidate in an election could not recover damages under civil RICO based on allegations of electoral misconduct. We expressed concern over "the continuing assaults on political legitimacy" posed by post-election damage suits brought in federal court by defeated candidates. Id. at 1286. Similarly, a RICO lawsuit to contest the methods by which the victors in a zoning fight secured a favorable legislative or administrative outcome would

"impair the respect to which the enactments of those duly elected are entitled." Id.

The RICO statute is not, of course, the only statute or even the primary statute relating to the conduct of developers in land use disputes. State laws, including the laws of Virginia, provide extensive procedures under which developers can contest arbitrary zoning and condemnation decisions. Indeed, HMK vigorously pursued those remedies in its earlier state lawsuits. Federal and state criminal laws provide criminal penalties for fraud, bribery, extortion, and other such offenses. The enhanced civil and criminal remedies of RICO, however, are available only when the conduct at issue amounts to a pattern of racketeering activity.

Because the misconduct that HMK has alleged in this development dispute does not amount to a pattern of racketeering activity, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

HMK CORPORATION, Plaintiff	)	
v.	)	Civil Action No. 86-0012-R
JOHN C. WALSEY, et al., Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the following motions: (1) the motion to dismiss or, in the alternative, for summary judgment on behalf of the defendants Hedrick, Balderson, and Jane or John Does 11-20; (2) the motion to dismiss or, in the alternative, for summary judgment on behalf of defendants Walsey, Blumberg, Sigma CJ, Petula Associates, and Jane or John Does 1-10; (3) the motion to dismiss of King and Hodge; (4) the motion to dismiss on behalf of Jane or John Does 21-30; and (5) plaintiff's motion for a preliminary injunction. The Court

GRANTS defendants' motions on two theories, holding that principles of collateral estoppel and res judicata, along with the statute of limitations, bar plaintiff's action.

I. FACTS:

Although the parties have filed voluminous briefs and exhibits detailing the history of this case, the Court finds the case extraordinarily simple. Two developers have crossed swords over a unified section of land so that advantages given one hamper the aspirations of the other. One party, HMK Corporation, sees fraud at every turn, and commences lawsuits at the drop of a hat.

The land in question is the Jahnke-Chippenham Development Area ("JCDA"). This area is bordered on the east by the Chippenham Parkway and on the south by the Midlothian Turnpike. It is bisected by Jahnke Road and by a proposed extension of the Powhite Parkway. Two developers are HMK Corporation ("HMK") and a series of

companies and partnerships called, for the purposes of this suit, the "Boulders Developers." ("Boulders").[1]

The Court cannot do justice to the fine detail with which the parties have described the facts and will not even attempt to recite the chronology of events. Essentially, this suit boils down to three basic contentions: (1) that the defendants conspired to grant the zoning requests of Boulders while denying zoning to HMK; (2) that defendants attempted, and are still attempting, to condemn HMK's property for the private use of Boulders; and (3) that defendants are forcing HMK to donate land for the Powhite

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[1] The Boulders developers include (1) B.J. Associates; (2) B.J. Properties of Virginia, Inc.; (3) S.P.B. & Associates, Inc.; (4) Sigma Realty, Inc.; (5) Sigma CJ Associates; (6) Sigma Development, Inc.; (7) the Boulders; (8) Petula Associates Ltd., Inc.; (9) Chinaberry Associates; (10) Flintridge Station Associates; (11) Forge-O'Connell Properties IV; and (12) Boulders Investors.

The only Boulders developers actually named in this suit are: (1) Sigma CJ Associates; (2) Petula Associates, Ltd.; and (3) Jane or John Does 1-10.

Parkway and to pay for the collector-distributor roads proposed by HMK. Admittedly, there are allegations that do not fit into these categories and that concern more recent events. However, these later events are peripheral to the main dispute.[2]

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[2] HMK challenges as well (1) the occupation of the Pru-Care building in the Boulders' development and (2) the Board's zoning decisions on Boulders' Fidelity Building. It perceives these events as part of a more recent "lesser fraud" by defendants Balderson, Hedrick, and Boulders to circumvent the zoning conditions placed on Boulders. Appendix F to Complaint at 120.

The Pru-Care building lies within the Boulders' property that was rezoned on July 27, 1983. As a condition of that rezoning, Boulders was required to make certain road improvements, and until it completed these, occupancy permits were not to be issued. In September of 1984, VDH&T confirmed that Boulders had constructed the necessary improvements. Although some items still had to be finished before the road became part of the secondary system of the Virginia highways, the roads were functional. Accordingly, on March 6, 1985, the County issued a temporary occupancy permit for the Pru-Care building. HMK challenges the occupation of the building and perceives this as yet another instance of fraud.

The Fidelity Building is also on the Boulders' property that was rezoned in July 1983. When Boulders applied in 1984 for a building permit, the square footage of this building put Boulders above the maximum area of office space

it could construct. Accordingly, the County denied the application, directing Boulders to file an amended building permit application with reduced square footages. The County then rejected the amended form because Boulders had not calculated the square footages in the manner the County required. Boulders' next application was approved. Along with that application, however, Boulders filed for a zoning amendment to revise the square footage limitation imposed by the Board. Boulders' purpose was to obtain approval of the Fidelity Building at its originally submitted size. Not surprisingly, HMK objected to this zoning petition. The Board of Supervisors eventually approved the request on March 27, 1985, subject to additional restrictions concerning construction schedules and financial sureties for road improvements. Pursuant to the new rezoning, Boulders applied for, and received, a new build permit for construction of the previously-deleted footage.

HMK filed suit in state court on these issues but non-suited both actions prior to filing the present suit. These allegations are not barred by either the statute of limitations or res judicata. They do not, however, standing on their own constitute a "pattern of racketeering activity" under RICO. Hence, these do not support a RICO claim. More than two related acts are necessary to form a pattern. Torwest DBC, Inc. v. Dick, 628 F.Supp. 163 (D.Colo. 1986); Fleet Management Systems v. Archer-Daniels-Midland Co., 627 F.Supp. 550 (C.D.Ill. 1986); Northern Trust Bank/O'Hare, N.A. v. Inryco, 615 F.Supp. 828 (N.D.Ill. 1985). The Court is of the opinion that the entire course of conduct between HMK and the defendants does not constitute a RICO pattern. These two incidents are part of only a single episode, in which HMK protests County

(a) Zoning decisions favoring Boulders:

In 1982 and 1983, the Chesterfield County Board of Supervisors made a series of zoning decisions concerning the properties of HMK and Boulders. HMK contends that these decisions were the product of a conspiracy involving Boulders, and members of the County Planning Department and the Virginia Department of Highways and Transportation ("VDH&T"). The purpose of the conspiracy was to favor Boulders so that it could intensively develop its property, while HMK remained severely limited in its development. As a result of these decisions, HMK allegedly entered the market two years after Boulders.

The first cluster of zoning decisions concerned the "Call tract," a 135-acre parcel

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zoning in favor of Boulders. This does not constitute a RICO pattern, as the necessary "continuity plus relationship" is lacking. Sedima, S.P.R.L. V. Imrex Co., --- U.S. ---, 105 S.Ct. 3275, 3285 n.14 (1985). Standing on their own, these allegations demonstrate only isolated behavior, which, at most, is part of only a single fraudulent scheme.

owned by Boulders that lies between Jahnke Road and the Midlothian Turnpike. In May of 1982, Boulders requested that this area be rezoned from agriculture to planned development. The Board of Supervisors approved this rezoning, after several alterations of the plans, in October 1982. Boulders' proposal, as finally approved, provided for direct access from the tract onto Chippenham Parkway by way of a "flyover" road.

In January 1983, the Virginia Department of Highways and Transportation ("VDH&T") notified the County that it would not approve Boulders' flyover concept and that it would only approve an access plan for the project utilizing an at-grade intersection of Chinaberry Drive and Jahnke Road. This plan would require an extension of Chinaberry Drive from the Call tract to Jahnke Road. The extension would cut across the property of HMK. Because of VDH&T's objections, Boulders subsequently amended its proposal for the Call tract to eliminate the flyover and to substitute

in its place an extension of Chinaberry Drive. The Board approved this amendment on July 27, 1983.

The second zoning decision concerned "Sigma II," an 85-acre parcel owned by Boulders that bordered on the southern boundary of the Call tract. In June 1983, Boulders filed a rezoning application that included 285 multi-family dwelling units and 200,000 square feet of office space. The Board of Supervisors approved this request on November 23, 1983, but imposed several conditions, including one requiring the construction of an extension of Chinaberry Drive to Jahnke Road. Again, this extension would cut across HMK property.

During this period, HMK was submitting its own plans, which led to the third set of decisions. In October 1982, HMK filed an application to rezone a tract of land north of Jahnke Road from Agricultural to "B-3." HMK sought unconditional zoning that would have allowed HMK to

build, virtually without restriction, a host of intensive commercial and retail uses. Due to the unplanned nature of the application, the County's planning staff suggested to HMK that it withdraw the application and refile after further consideration. Shortly thereafter, HMK voluntarily withdrew its application.

Later, in June of 1983, HMK filed another application, this time to rezone its property from agricultural to Conditional Use Planned Development ("CUPD"). This application postdated the Boulders applications for the Call tract and Sigma II. In November 1983, the Board of Supervisors denied HMK's application. The Board had received complaints from citizens about the density of the project, and on the basis of those complaints, had requested that HMK limit the type, density and location of commercial uses adjacent to the established neighborhoods north of the Powhite Parkway. HMK refused to compromise its commercial plans to the north.

The final Board decision in this series concerned the adoption of an amendment to its "General Plan 2000." Because of the developments proposed by both Boulders and HMK, the County had contracted with a consultant to analyze land-use and traffic flow in the JCDA. The end result was a General Plan Amendment that proposed a transition of land uses proceeding northwards from the Midlothian Turnpike. This amendment would limit in particular the development of HMK's property. However, the proposed plan stipulated that if HMK constructed a direct access to an adjacent limited access highway (such as the proposed Powhite Extension), the General Plan could be modified to permit more intensive use of the HMK tract north of Powhite.[3] The amendment to the General Plan was adopted by the Board of Supervisors on July 27, 1983.

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[3] In fact, this later modification did occur. On October 23, 1985, the Board of Supervisors approved the 1985 JCDA General Plan amendment, which accommodates the HMK proposal.

(b) Condemnation of HMK property:

As the zoning decisions above highlight, an extension of Chinaberry Drive across HMK property is required to service the properties south of Jahnke Road. Accordingly, the VDH&T has implemented quick-take procedures under Va. Code § 33.1-89 et seq. to acquire the property. Under § 33.1-122, plaintiff has been divested of its title to the property, and the Commonwealth has obtained a defeasible title. The County will not gain an indefeasible title to this property until condemnation procedures are completed with a favorable ruling for the Commonwealth. No final decision by the state courts has yet been made.

(c) Powhite Extension and Collector-Distributor System:

The final chapter in this saga is HMK's claim that it is being forced to pay for the collector-distributor system on the Powhite extension. Sometime prior to June 20, 1983, HMK had notified the County that it wished to have

certain design changes made to the Powhite extension plans. These modifications would accommodate a collector-distributor road network serving HMK's development. HMK's intent, apparently, was to propose this system as an alternative to the extension of Chinaberry Drive. If successful, HMK would have preserved its property lying between the Call tract and Jahnke Road and would have been able to share the cost of the collector-distributor network with Boulders. Instead, HMK claims, the defendants delayed the consideration of this proposal so that the County never seriously considered it as an alternative to Chinaberry Drive. Thus, while the collector-distributor system has now been approved by the VDH&T, it serves HMK's development primarily, and HMK must bear most of the cost.

HMK alleges numerous delaying tactics on the part of the defendants, among them the County's refusal to submit HMK's proposal for the system

to the consultant working on the amendment to the General Plan 2000. These "delaying tactics" apparently culminated with HMK's dispute with the County over submitting the proposal to the VDH&T. The VDH&T had notified the County on June 20, 1983 that it would consider proposals by private developers for modifications of the Powhite extension. It required, though, that the private developer pay for the costs of preparing the changes in engineering design. In addition, it required that the proposals be submitted by the private developer via the County administration.

In accordance with the VDH&T's requirements, the County sent a contract to HMK providing the conditions for forwarding the plans to VDH&T. Certain of the contract provisions HMK challenged as being unconstitutional conditions. HMK filed suit in federal court on these grounds and prevailed. See HMK Corporation v. County of Chesterfield, C/A 84-0170 (E.D.Va., August 9, 1984) (Warriner, J.). Since that time, the VDH&T

has entered into a contract with the County to incorporate the designs of HMK and has hired a consultant to engineer these designs. However, because of the dispute over the contract, HMK's submitted its proposal to VDH&T almost a year after HMK originally provided them to the County.

II. THE EFFECT OF PRIOR LAW SUITS:

Prior to the present law suit, HMK filed a series of suits in both federal and state court. The preclusive effect of these suits now eliminates much of plaintiff's present suit. The present suit challenges the activities related above and contains seven counts. Counts I-IV allege various RICO violations. Count V charges the County and State defendants with a violation of 42 U.S.C. § 1983. Count VII charges common law fraud and Count VII charges a violation of Virginia's business conspiracy act, Va. Code § 18.2-500.

In examining the preclusive effect of the prior suits on these present claims, the Court

will limit its analysis to the alleged RICO violation. The § 1983 claim is so vague that the Court cannot determine whether or not it is barred. Although the claim probably is barred, the Court dismisses it without prejudice and grants plaintiff leave to refile it with greater specifically, should it be so advised. The pendent state law claims require no discussion. The Court in its discretion dismisses these without prejudice. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).[4]

In litigating these events, plaintiff elected a piecemeal approach. It first filed a

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[4] The defendants have moved for the Court to dismiss defendants Jane and John Does 1-30. Generally, John Doe suits are permissible only against "real, but unidentified, defendants." See Schiff v. Kennedy, 691 F.2d 196, 197 (4th Cir. 1982). If "it does not appear that the true identity of an unnamed party can be discovered through discovery or through intervention of the court," then the court can dismiss the action. Id. at 198. In this case, the plaintiff has had more than adequate time to discover the identities of these parties, if they do in fact exist. Accordingly, the Court dismisses the action as to Jane and John Does 1-30 without prejudice.

series of state suits challenging the 1982-83 zoning decisions, all of which were later consolidated. It then filed a federal suit challenging the conditions the County imposed on HMK in return for submitting HMK's collector-distributor system to VDH&T. Finally, it filed suit, again in federal court, alleging an unlawful conspiracy to take its property for the extension of Chinaberry Drive. Having elected to sue on some of the underlying events, HMK is now bound by the findings in the prior suits on those matters.[5]

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[5] The case law abounds with decisions under RICO granting preclusive effect to prior judgments. See, e.g., County of Cook v. Midcon Corp., 773 F.2d 892 (7th Cir. 1985) (prior state judgments); Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985) (prior findings of arbitration panel); Hotel Corp. of South v. Rampart, 46 B.R. 758 (D.C.La. 1985), aff'd, 781 F.2d 901 (5th Cir. 1986) (prior adversary proceeding in bankruptcy). In fact, courts permit the use of offensive collateral estoppel where a defendant has previously been convicted under the criminal provisions of RICO. See County of Cook v. Lynch, 560 F.Supp. 136 (N.D.Ill. 1982); Anderson v. Janovich, 543 F.Supp. 1124 (W.D.Wash. 1982); State Farm Fire & Casualty Co. v. Caton's Estate, 540 F.Supp. 673

HMK's prior three lawsuits track the three broad categories of events described above. Since the preclusive effect of each varies, the Court will analyze them each in turn.

(a) Zoning decisions favoring Boulders:

HMK filed five suits in the Chesterfield Circuit Court challenging the validity of all of the 1982-83 zoning decisions described above. Judge Gates consolidated these suits with one filed by the individual property owners and considered the validity of the zoning decisions as a whole.

The issues as framed at trial were:

> (1) the validity of the rezoning decisions concerning the Call tract made by the Board on October 27, 1982 and July 27, 1983;

(N.D.Ind. 1982). See also 18 U.S.C. 1964(d) (estopping a defendant from denying the essential allegations of a criminal conviction in any subsequent civil proceeding brought by the United States).

(2) the validity of the amendment to the General Plan 2000 approved by the Board on July 27, 1983;

(3) the validity of the rezoning decisions concerning the Sigma II parcel made by the Board on November 23, 1983;

(4) the validity of the rezoning decision concerning the HMK tract made by the Board on November 23, 1983.

As can be seen, HMK was attacking the zoning decisions that it now challenges here.

In a letter-opinion dated June 20, 1984, Judge Gates found all of these decisions valid. He held that defendants had offered "substantial evidence of reasonableness" in support of the rezoning of the Call tract and Sigma II and the amendment to the General Plan. He further found that the evidence showing the unreasonableness of HMK's rezoning proposal was substantial and supported the denial by the Board of Supervisors.

In addition, the Court remarked on HMK's allegations of fraud:

> Plaintiff, throughout this litigation, has intimated that the Board of Supervisors conspired to favor one developer over another. This is a controversy between developers who own property adjacent to Chippenham Parkway, a limited access highway. The Court has allowed liberal and exhaustive pre-trial discovery. The evidence at trial failed to show any impropriety and partiality by the Board in rendering its decision.

HMK appealed to the Supreme Court of Virginia but its certification for appeal was denied on December 5, 1985.

Even ignoring the technical rules of preclusion, the Court finds that these state court rulings bar the present suit. Common sense dictates that HMK has no further remedy if the zoning decisions are themselves valid and supported by substantial evidence. The zoning decisions alone were the cause of any damage that HMK suffered. Thus, if they are found valid, they purify any possible fraud that may have

preceded.

In this respect, the Court notes with approval the Virginia law embodied in Board of Supervisors v. Jackson, 221 Va. 328, 269 S.E.2d 381 (1980) and Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948). These cases forbid the admission of evidence on the motive of legislators when a party challenges the validity of legislation. As long as the legislative decision is "fairly debatable" in view of the evidence presented, it is valid. In limiting the evidence in this manner, Virginia prevents end-runs on the legislative process. It recognizes the reality that probably all legislative decisions involve a certain amount of compromise, and it prevents litigants from rummaging through these compromises whenever they are dissatisfied with the results. This Court finds this rule both practical and wholesome.

To state this point in the language of tort, HMK has failed to prove that defendants' conduct

was the proximate cause of its damages. Section 1964 requires that there be a discernible causal connection or "nexus" between the acts of the defendants and any harm to plaintiffs. Sedima, S.P.R.L. v. Imrex Co., --- U.S. ---, 105 S.Ct. 3275, 3285-86 (1985); Waste Recovery Corp. v. Mahler, 566 F.Supp. 1466 (S.D.N.Y. 1983). Even assuming the existence of fraud, HMK has failed to prove this connection. The Board's decisions were an intervening and purifying cause.[6]

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[6] This case is strikingly similar to County of Cook v. Midcon Corp., 773 F.2d 892 (7th Cir. 1985). In this case, the plaintiffs claimed various RICO violations on the part of a utility company, Peoples Energy, and its subsidiaries, Peoples Gas Light and Coke Co. and North Shore Gas Co. Allegedly, the subsidiaries engaged in a scheme to defraud which began when they obtained rate increases on the basis of intentional misrepresentations. Thereafter, they diverted the revenues derived from the rate increases by paying dividends to Peoples Energy, which in turn invested the proceeds in nonutility subsidiaries. The scheme allegedly came to fruition when Peoples Energy reorganized and divested the nonutility subsidiaries to Midcon Corporation.

Before the RICO suit was filed, a state court had approved the dividend payments and the reorganization. To overcome any claims of estoppel, plaintiffs claimed that the rate increases, not the dividends and reorganization,

Although the Court finds this reasoning conclusive, it now turns to the more traditional doctrines of claim and issue preclusion, since these too require that the RICO claims relating to these events be dismissed. In determining the preclusive effect of this prior state court judg-

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formed the core of their scheme to defraud. Despite this argument, the Seventh Circuit found them collaterally estopped, stating that "plaintiffs are attempting to make their allegations that the rate increases were fraudulently obtained sound different from the issues resolved in the state court suit by arbitrarily separating these allegations from those related to the other events leading up to and including the reorganization." Id. at 901.

HMK is attempting a similar feat. It is challenging actions taken by staff members and other defendants prior to decisions by the County Board of Supervisors and is claiming that these should be examined independently for fraud. However, the Board is the only entity legally responsible for the actions which allegedly hurt HMK. If its decisions are approved, HMK has no further remedy. It cannot examine all of the minutia of events leading up to these decisions for further evidence of fraud.

This reasoning applies to all of plaintiff's prior suits, including those filed in federal court. In all, the County was the only entity legally responsible for the actions at issue and thus was the only party properly sued. HMK cannot now evade the preclusive effect of these suits by naming parties who helped prepare the County but did not make the ultimate decision.

ment, the Court must examine Virginia law on preclusion and give the same full faith and credit to the judgment that it would receive in the state courts. 28 U.S.C. § 1738. Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90, 96 (1980). This procedure applies to both claim and issue preclusion, whether or not the subsequent action falls within the exclusive jurisdiction of the federal courts. Marrese v. American Academy of Orthopaedic Surgeons, --- U.S. ---, 105 S.Ct. 1327 (1985). Absent an exception to the full faith and credit statute, 28 U.S.C. § 1738, state law determines the preclusive effect of a prior state judgment, even if the subsequent action involves a claim in the exclusive jurisdiction of the federal courts. Marrese, 105 S.Ct. at 1332.

This Court finds that the principles of both res judicata and collateral estoppel bar the relitigation of the RICO claims relating to the zoning decisions. Under generally accepted

principles of res judicata or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. at 94. Plaintiff's RICO claim could and should have been brought in state court since it mirrors the prior state claims. In its various bills of complaint, plaintiff alleged that the defendants "conspired to improperly favor the development and use of the Call tract" through these zoning decisions. See, e.g., Bill of Complaint, M.K. Realty Corp. v. Sigma Development, Inc., Chancery No. 11494-83 (Chesterfield Circuit Court) 148. Only the RICO label was missing.

Plaintiff contends that it could not have brought its RICO claim in state court because RICO falls within the exclusive jurisdiction of the federal courts. In support of this contention, plaintiff cites a plethora of decisions,

mainly from state courts, finding exclusive jurisdiction. See, e.g., Kinsey v. Nestor Exploration, Ltd., 604 F.Supp. 1365 (E.D.Wash. 1985); Main Rusk Associates v. Interior Space Constructors, 699 S.W.2d 305 (Tex. Civ. App. 1985); Greenview Trading Co., Inc. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985). However, the reasoning of these cases is uncompelling.

Normally, state courts are presumed to have concurrent jurisdiction over federal statutes. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981). This presumption can only be rebutted "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between the state court jurisdiction and federal interests." Id. The state decisions plaintiff cites rebut this presumption primarily by relying on the fact that RICO is modeled after federal antitrust. Federal antitrust lies within the

exclusive jurisdiction of the federal courts.

This analogy is too weak to overcome the normal presumption that state courts have concurrent jurisdiction with federal courts. Admittedly Congress patterned the RICO treble damages after federal antitrust, but it did so simply to encourage enforcement of RICO by private citizens. See Sedima, 105 S.Ct. at 3280-81 (reviewing the legislative history of the act). Double and treble damages are common in both federal and state court and are totally unrelated to the issue of jurisdiction. See, e.g., Va. Code §§ 55-216 (providing for treble damages for waste during the pendency of a suit); 56-5 (providing for treble damages for injury to the property of a public service corporation). Since in all other respects RICO differs greatly from federal antitrust, the need for exclusive federal jurisdiction under the antitrust statutes cannot justify a similar result under RICO.

Nor can the Court perceive any indication in either the language of the statute or in legislative history that jurisdiction should be exclusive. As one of the principal draftsmen of RICO has stated, "[t]here is nothing on the face of the statute or in the legislative history" that touches on the question of concurrent jurisdiction. "[N]o one even thought of the issue." See Greenview Trading, 489 N.Y.S.2d at 505 (quoting G. Robert Blakey).

The only compelling argument for exclusive jurisdiction is that several of the predicate acts fall within the exclusive jurisdiction of the federal courts. Arguably, this demonstrates a clear incompatibility between state and federal jurisdiction, but the Court finds that even this does not rebut the presumption of concurrent jurisdiction. First, in adjudicating a RICO case, state courts only need determine whether the alleged predicate acts did or did not occur. This type of factual finding is unlikely to

involve any complex interpretation of the underlying federal statutes, which would require exclusive jurisdiction. Second, as a practical matter, state courts are unlikely to find themselves in the position of interpreting and applying the underlying federal statutes. The vast majority of RICO cases involve garden variety state law fraud, where the plaintiff has simply seized upon RICO to obtain federal jurisdiction, treble damages, and attorney fees. If anything, RICO involves federal courts in the adjudication of state law claims, rather than the other way around. See Sedima, 105 S.Ct. at 3287 n.16.

For these reasons, this Court finds that jurisdiction over RICO is concurrent, not exclusive. This finding is supported by the one appellant court to express an opinion on the subject. See County of Cook v. Midcon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985) (suggesting that jurisdiction is concurrent but finding it

unnecessary to rule on the issue). See also Chas. Kurz Co. v. Lombardi, 595 F.Supp. 373, 381 n.11 (E.D.Pa. 1984); Luebke v. Marine National Bank, 567 F.Supp. 1460, 1462 (E.D.Wis. 1983).

Even if plaintiff were not barred by the principles of res judicata, it would be collaterally estopped from relitigating the question of fraud. In general, collateral estoppel precludes religitation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication; (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suits; (3) the resolution of the particular issues was necessary to the court's judgment; and (4) those issues are identical to issues raised in the subsequent suit. See Allen v. McCurry, 449 U.S. at 94; Norfolk & Western Ry. Co. v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980); Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974).

HMK does not contest that all of the parties in the present suit were parties or privies of parties in the prior state suit.[7] Nor does it really contest that the issue of fraud and conspiracy was litigated and decided on the merits in the prior suits. It disagrees primarily as to whether Judge Gates decision on the matter of fraud was necessary.

HMK argues that fraud was irrelevant to the determination of the state suit since, under

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[7] The defendants in the present suit are: (1) Richard L. Hedrick, Chesterfield County Administrator; (2) Stanley R. Balderson, Director of the Chesterfield County Department of Planning; (3) John C. Walsey, President of Sigma Development, Inc.; (4) Barry S. Blumberg, Secretary/Treasurer of Sigma Realty, Inc.; (5) Sigma CJ; (6) Petula Associates; (7) Harold C. King, Commissioner of VDH&T; (8) Jack S. Hodge, assistant Chief Engineer of VDH&T; and (9) Jane or John Does 1-30. The defendants not named in this state suit were Hedrick, Walsey, Blumberg, Petula Associates, King and Hodge.

The Court finds the absence of King and Hodge in the prior suits irrelevant since they are alleged to be part of the conspiracy formed by the other defendants. If the state court found that the other defendants did not conspire against HMK, then the conspiracy claim against King and Hodge must fail. More than one party is required for a conspiracy.

Virginia law, legislative intent cannot be analyzed in determining the validity of legislative decisions. As noted above, evidence on intent is not even admissible at trial. While HMK is correct in its reading of Virginia law, the Court finds HMK's argument disingenuous given the stance HMK took in the state court. HMK pressed its allegations of fraud and conspiracy throughout its state litigation, and Judge Gates recognized this in his letter-opinion. It used these allegations as background to try to persuade Judge Gates that the Board's decisions were arbitrary and capricious. Given HMK's injection of the issue into the case, and given Judge Gates' ruling on the matter, the Court finds that further litigation on this matter is collaterally estopped.

(b) Condemnation of the HMK property:

As with the zoning decisions, HMK has previously litigated the condemnation of its property. On November 6, 1984, HMK filed suit in

federal court against the County and Harold King, Commissioner of VDH&T, charging that they conspired with Boulders to deprive HMK of its property for private, rather than public, use. The Honorable Judge Warriner of this Court ruled that HMK's claim was not ripe for adjudication because title had not yet vested in the Commonwealth. See HMK Corp. v. County of Chesterfield, 616 F.Supp. 667 (E.D.Va. 1985). HMK noted an appeal of this ruling to the Fourth Circuit but subsequently withdrew the appeal. To date, there has been no final state court decision on whether or not the taking was constitutionally valid and for a public use.

This Court refuses to act in an appellate capacity over Judge Warriner and considers itself bound by his rulings. It therefore dismisses all aspects of this case relating to the condemnation on the grounds that the issue is not ripe. Moreover it agrees with Judge Warriner that the state court's ruling, when made, will dispose of the

matter completely. At that point, HMK will have no further claims before this Court under RICO.

In the prior suit, HMK argued that there were no adequate provisions for damages in state court if, in fact, there was a conspiracy to deprive plaintiff of its property. Judge Warriner noted in response that HMK would not be entitled to further damages whichever way the state court decided. If the state court found that the property had been taken for a public use, then HMK would receive "just compensation" for its property. The taking would be legitimate and valid, so that HMK would have no further claim. If the state court found that the property was taken for a private use, again HMK would have no claim for additional damages. Any other damages suffered would be "only those damages that occur as a part of living and doing business in a civilized society" and thus would not be compensable:

> Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation--whether it be a zoning ordinance, health regulation, or traffic law--he is almost certain to suffer some temporary harm in the process. At the least he will usually incur significant litigation expenses and frequently he will incur substantial revenue losses because the use of property has been temporarily curtailed while the dispute is being resolved .... [There is no] utopian requirement that [an] enforcement action may not impose any cost upon the citizen unless the Government's position is completely vindicated. Williamson County Regional Planning Commission v. Hamilton National Bank, 105 S.Ct. 3108, 3124-27 (1985) (Stevens, J., concurring).

HMK Corp. v. County of Chesterfield, 616 F.Supp. at 671.

(c) Powhite Extension and Collector-Distributor System:

All of HMK's claims relating to the Powhite Extension and the collector-distributor system are similarly barred. On March 15, 1984, HMK sued the County and Richard Hedrick, the county

administrator, challenging the contract HMK was forced to sign to have its proposal forwarded to the VDH&T. It contended that certain of the provisions imposed unconstitutional conditions. This Court agreed, again in an opinion by Judge Warriner, and enjoined the enforcement of the provisions in question. HMK Corp. v. County of Chesterfield, C/A 84-0170-R (E.D.Va. August 9, 1984).[8]

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[8] HMK contested the constitutionality, both state and federal, of paragraphs 5 and 6 of the contract. Judge Warriner summarized the obligations imposed by these paragraphs as follows:

(1) HMK must convey the necessary real estate for the right-of-way for the Powhite Parkway Extension if the requested design is included in the project.

(2) If such conveyance is "required as a condition of rezoning," HMK will receive no compensation for the real estate.

(3) If such conveyance is not required as a condition of rezoning, HMK will receive compensation based upon an appraisal rather than upon statutory prescribed eminent domain proceedings.

(4) HMK must pay the construction costs of the proposed collector-distributor road network should it be built.

With respect to the last provision, the court found only that this requirement could not be a valid condition for the County's agreement merely to forward the plans to VDH&T. The court

The Court then held a hearing to determine the damages that HMK had incurred. Because of the dispute over the contract, HMK's proposal reached the VDH&T almost one year after it would have originally. The Court awarded damages for the increase in the engineering costs, discounted by plaintiff's ability to invest these funds.

The Court left unresolved only one issue of damages and that issue appears still to be open. HMK had moved for a general continuance of damages, if any, caused by defendants' refusal to allow "phasing" for the design work. According to plaintiff, if there had been no unconstitutional contract provisions, it could have designed the collector-distributor roadway network in two phases. The first phase would cost approximately $200,000 to $400,000 and implementation of that design phase would allow sufficient access to accommodate a million square

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did not address whether this might be valid under other circumstances, such as as a condition of rezoning.

foot office development. The second phase would provide access for a full three million square foot complex--for which HMK had yet to secure rezoning. This second phase would cost another $800,000 to $1 million.

If there had been no delay in forwarding the plans, HMK would have known whether it had the rezoning before the design of phase two was necessary. Assuming that no zoning change was granted at all, plaintiff could abandon the second phase before it was necessary to pay for Part Two, and would only have had to expend $200,000 to $400,000 rather than the full $1.2 million. According to plaintiff, the time delay caused by the unconstitutional contract provisions made it impracticable to phase the design work. Therefore, plaintiff was being forced to expend $1.2 million to insure that it had a sufficient collector-distributor roadway network accommodating its proposed three million square foot office/retail complex, and, if the zoning

request were turned down, plaintiff would be stuck with a white elephant costing $1.2 million.

In response to this dilemma, the Court continued the case to await the result on plaintiff's proposal for rezoning. No final determination was ever made. It appears from this Court's review of the record that plaintiff ultimately received the rezoning it desired and that it was not therefore forced to waste its money on designing an unneeded system. Plaintiff has thus suffered no further damages. However, this matter has not been argued to the Court and was explicitly left open by Judge Warriner. Accordingly, the Court is willing, should counsel so desire, to hear argument on this point and award damages should they appear warranted.

Notwithstanding the one issue left open, this prior federal suit bars all other allegations, both as to the events themselves, and as to damages incurred. All significant events relating to plaintiff's present RICO claim had

already occurred at the time of this first federal suit. Therefore, plaintiff should have raised any claims of fraud at that time. Having not done so, it is now barred from raising this claim. See Allen v. McCurry, 449 U.S. at 94.

III. STATUTE OF LIMITATIONS:

The statute of limitations for RICO is an additional independent bar to the suit. Like many other areas in federal civil law, RICO contains no federal statute of limitations expressly applicable to this suit. This does not mean that Congress intended that there be no time limit within which to bring an action. Rather, where "Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." Wilson v. Garcia, --- U.S. ---, 105 S.Ct. 1938, 1942 (1985).

Wilson provides the appropriate procedure a court should follow in deciding what limitations period should govern a federal cause of action containing no express statute of limitations.

> First, the court must determine whether one limitations period should apply to all RICO actions or whether different periods should apply depending on the particular facts of the case. Second, the court must characterize the RICO action before it (or RICO actions generally, depending on the answer to the first question), or to put it another way, the court must analogize RICO to a state cause of action. Third, the court must determine what state limitations period applies to the kind of action the court has found RICO to be. Finally, the court must determine whether that period is inconsistent with the policies of RICO, and if so what limitations period better serves those policies.

Electronics Relays (India) Pvt. Ltd., v. Pascente, 610 F.Supp. 648, 649-50 (N.D.Ill. 1985).

One uniform statute of limitations should apply, at least within a state, to RICO actions.

The Court concludes that the limitations period should not be based on the underlying predicate acts. If such were the case, parties, attorneys, and courts would waste scarce resources over "useless litigation on collateral matters," Wilson, 105 S.Ct. at 1947, due to the uncertainty of such a scheme. RICO actions can be brought upon widely differing scenarios, so that many situations could involve two or more limitations periods. A court would then be confronted with selecting among disparate limitations periods within the same case. In other words, "subjecting civil RICO claims to the statute of limitations of the predicate acts represents an unworkable solution in all but a few cases." Morley v. Cohen, 610 F.Supp. 798, 809 (D. Md. 1985). The complexities become even deeper if a predicate act is susceptible to the application of more than one limitations period. Electronics Relays, 610 F.Supp. at 650 and n.1. A much more workable scheme is to employ a uniform statute of

limitations applicable to all RICO actions brought within the state.

The next step the Court takes is characterizing a civil RICO claim. This is a matter of federal law, Wilson, 105 S.Ct. at 1944 and n.19, which hinges upon the "elements of the cause of action, and Congress' purpose in providing it." Id. at 1943. Characterizing the chameleon-like civil RICO claim is a difficult task, since it is neither fish nor fowl. The federal courts, in analogizing RICO to state statutes, have differed dramatically. See Electronics Relays, 610 F.Supp. at 650-51 (collecting cases). Underlying its civil remedy can be acts "'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law. § 1961(1)." Sedima, S.P.R.L. v. Imrex Co.,

--- U.S. ---, 105 S.Ct. 3275, 3278 (1985) (footnote omitted). The vast array of predicate acts on which civil RICO liability is based indicates Congressional concern with the far-reaching and diffuse nature of organized crime. "[T]he RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983).

As a result of its all-encompassing scope, it is not surprising that courts have been unable to find an analogous state statute. Few states have RICO counterparts, and courts have sometimes struggled when locating the appropriate pigeon-hole in which to fit a civil RICO claim.

No specific Virginia statute mirrors RICO. Because of its wide sweep, one cannot simply categorize a claim by the factual nature of its predicate acts. Doing so embroils courts and litigants in the confusion referred to earlier,

raising the specter of differing limitations periods within the same suit or based merely on the factual differences between RICO claims. The Court therefore rejects the parties' invitations to analogize RICO to any specific statute.[9]

Many courts have borrowed limitations periods from state fraud causes of action. E.g., Silverberg v. Thomson McKinnon Securities, Inc., 787 F.2d 1079 (6th Cir. 1986); Eisenberg v. Gagnon, 564 F.Supp. 1347 (E.D.Pa. 1983). While the Court first observes that, in Virginia, the

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[9] The Court also finds that the Virginia five-year limitations period, Va. Code § 8.01-243(B), for injury to property does not apply. Although injury to property or business is an element of a civil RICO action, 18 U.S.C. § 1964(c), such injury is not the distinguishing aspect of RICO. RICO's central feature is not injury to property, but personal liability so to eliminate the effects of organized crime on legitimate business. The five-year statute of limitations in § 8.01-243(B) applies to tort actions for property damage. The Court cannot characterize a RICO action as injury to property; the two do not fit. Electronics Relays, 610 F.Supp. at 652.

end result would be the same,[10] its analysis is somewhat different. Fraud covers many situations, but RICO covers more: "the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based." Electronics Relays, 610 F.Supp. at 651; see also Morley v. Cohen, 610 F.Supp. 798, 808-09 (D.Md. 1985) (rejecting fraud analogy). The elements of fraud and RICO differ substantially, as do the purposes of the two actions. Cf. O'Hara v. Kovens, 625 F.2d 15, 18 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981) (requiring "a commonality of purpose between the federal right and the state statutory scheme").

The Court's conclusion applies as well to the Virginia business conspiracy statute, Va. Code § 18.2-500. Again, the elements and

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[10] The Virginia Supreme Court, in Pigott v. Moran, 231 Va. ---, 341 S.E.2d 179 (1986), applied the one-year general limitations period of Va. Code § 8.01-248 to a common law fraud action. Thus, if the Court analogized RICO to fraud, then this limitations period would apply.

purposes of the two statutes diverge. Where the Virginia act requires "a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business," Allen Realty Corp. v. Holbert, 227 Va. 441, 318 S.E.2d 592, 596 (1984), a RICO § 1962(c) cause of action is made out by proof of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, 105 S.Ct. at 3285.

The business conspiracy statute redresses a much narrower range of conduct than does RICO:

> the Virginia Conspiracy Statute ... appl[ies] to any malicious conduct that injuries business. However, such conduct must be directly aimed toward damaging the business, trade, reputation or profession: The injury must not be a result of an action taken for mere personal gain.

Nationwide Mutual Fire Insurance Co. v. Jones, 577 F.Supp. 968, 970 (W.D.Va. 1984) (combination of persons seeking to defraud an insurance company, for their own personal gain, not reached

by the statute); see also Buschi v. Kiruen, 775 F.2d 1240 (4th Cir. 1985).

RICO spans not only that conduct but more, since Congress intended it to stamp out organized crime wherever it exists and in whatever form it holds. Sedima, 105 S.Ct. at 3286 ("RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime"); see also United States v. Turkette, 452 U.S. 576, 589 (1981) (Congressional purpose in enacting RICO was "to seek the eradication of organized crime in the United States"). Although the two statutes redress similar injuries, RICO is aimed at a much broader range of behavior: it does cover conduct undertaken for personal enrichment, and it does embrace actions not specifically undertaken with the intent to injure a business. The Court therefore concludes that the Virginia business conspiracy act is not an appropriate state statute from which to borrow a statute of

limitations for RICO.[11]

Because of the inability to analogize RICO to a Virginia statute, the Court turns to Virginia's catch-all limitations period.[12] Other courts have followed this approach. E.g.,

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[11] Past decisions of this Court, interpreting the old Virginia statute of limitations scheme, have held that a five-year limitations period applies to this action. Federated Graphics Cos. v. Napotnik, 424 F.Supp. 291 (E.D.Va. 1976). Whether the reasoning of Pigott v. Moran, 231 Va. ---, 341 S.E.2d 179 (1986) changes this result is a decision left for another day.

[12] Until now, the Court's path has paralled that taken by Judge Hart in Electronics Relays. He ultimately determined that RICO should be characterized as a treble damages action for purposes of selecting the appropriate statute of limitations. 610 F.Supp. at 651. He then borrowed the 2-year statute from Ill. Rev. Stat. ch. 110, § 13-202 ["Actions .... for a statutory penalty"]. This Court does differ somewhat in this characterization, since RICO is much more than a cause of action having treble damages as its remedy. Additionally, Virginia has no statutory penalty provision comparable to the Illinois statute, and no Virginia treble damages remedy flows from a cause of action suitable as a borrowing statute for RICO statute of limitations purposes. If Virginia had an analogous statute, this Court's decision might be different. Still, Judge Hart's ultimate result is similar to this Court's, in that a general limitations period, prescribed by statute, is adopted.

Durante Bros. & Sons, Inc. v. Flushing National Bank, 755 F.2d 239 (2d Cir. 1985), cert. denied, 105 S.Ct. 3530 (1985) (as RICO has no state-law counterpart, New York's 3-year limit on actions to enforce a liability created by statute applies): Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) (California's 3-year period for actions based on statute); Victoria Oil Co. v. Lancaster Corp., 587 F.Supp. 429 (D.Col. 1984) (Colorado's 3-year period for actions based on statute). Indeed, district courts within this circuit have taken this path. In Morley v. Cohen, 610 F.Supp. 798 (D.Md. 1985), Judge Ramsey adopted the Maryland 3-year limitations period for civil actions at law. Judge Erwin, in Seawell v. Miller Brewing Co., 576 F.Supp. 424 (M.D.N.C. 1983), borrowed North Carolina's 3-year statute of limitations for statutory-liability claims.[13]

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[13] In Wilson, the Supreme Court decided that catchall periods of limitation for statutory claims were not appropriate limitations periods

Va. Code § 8.01-248 [Personal actions for which no other limitation is specified] provides that "[e]very personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued." The Court must determine whether this 1-year limit conflicts with the federal policy underlying RICO.

Congress has stated that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904 of Title IX, Pub.L. 91-452, 84 Stat. 947. At first blush, a 1-year limitations period seems rather short. But, as the Electronics Relays court noted, a "violation of RICO involves a very serious injury; a kind of injury that cannot go unnoticed by the victim, at

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for 42 U.S.C. § 1983. 105 S.Ct. at 1948. The Court reasoned that Congress likely did not intend this result, due to the relative scarcity of statutory claims when § 1983 was enacted. With respect to RICO, however, such catchall limitations periods, as well as statutory ones, were in wide use when Congress passed RICO in 1970.

least not for long." 610 F.Supp. at 653 (two years is "certainly long enough to realize one has been injured by a RICO violation and to bring suit"). The same applies for a 1-year period: any injury occasioned by a RICO violation should be apparent within a short period of time. One year provides adequate time within which to bring suit after learning of the violation and performing any necessary pre-filing investigation.

Additionally, tolling and accrual doctrines will "ensure that no diligent RICO plaintiff will find his claim time-barred." Id.; Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), cert. denied, 106 S.Ct. 1516 (1986) ("the general federal rule, which provides that the statute of limitations begins to run when a plaintiff knows or should know of the injury, applies in civil RICO cases"); Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Blanck v. McKeen, 707 F.2d 817 (4th

Cir. 1983), cert. denied, 464 U.S. 916 (1983). These principles will adequately provide for the preservation of valid RICO suits.

Finally, other courts have applied a 1-year limitations period to civil RICO actions. Bowling v. Founders Title Co., 773 F.2d 1175 (11th Cir. 1985), cert. denied, 106 S.Ct. 1516 (1986); Moore v. A.G. Edwards & Sons, Inc., 631 F.Supp. 138, 144 (E.D.La. 1986) ("Application of the one year period in on way frustrates, or is inconsistent with, the federal policy underlying RICO."); Bush v. Rewald, 619 F.Supp. 585, 603 (D. Hawaii 1985).

The Court therefore concludes that one year is the applicable statute of limitations for civil RICO actions brought in Virginia. HMK filed its complaint on Jan. 6, 1986. The factual recitation opening this Opinion shows that HMK's RICO claim accrued well before January, 1985, and that HMK knew, or should have known, of this by

that time.[14] As the collateral estoppel analysis demonstrates, HMK only turned to RICO after failing to obtain favorable decisions in other forums and actions. Indeed, Congress intended civil RICO to be an extraordinary remedy in the fight against organized crime. It was never intended to be a sword of Damocles, held in abeyance until aggressive litigants, having failed in conventional actions, unsheathed the RICO sword in their arsenal for use in yet

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[14] As the Court is at the summary judgment stage, it must consider whether there is any genuine question that HMK in fact knew, or at least reasonably should have known, of the RICO violation and its injuries by January, 1985. The Complaint and HMK's involvement in prior suits leaves no doubt that HMK was on sufficient notice to have brought a RICO action well before then. The plaintiff was extensively involved in the zoning process by virtue of its position as a competing developer, and throughout 1983 and 1984, it filed repeated lawsuits involving the development of JCDA, alleging broad conspiracies between private individuals and public officials. There is no material issue of fact precluding summary judgment on this aspect of HMK's claim. As it knew, or should have known, the factual basis for its RICO claims well before January of 1985, the Court holds that the claims are time-barred.

another lawsuit.

An order shall issue in accordance with this Memorandum Opinion. Let the Clerk send a copy of this Opinion to all counsel of record.

June 10, 1986
DATE

/s/ Richard L. Williams
UNITED STATES DISTRICT COURT

No. 87-788

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HMK CORPORATION,

Petitioner,

v.

JOHN C. WALSEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether this Court should reconsider the unanimous decision of the District Court and the Court of Appeals that a local land use dispute involving a single development opportunity did not constitute a "pattern of racketeering activity" under 18 U.S.C. § 1964(c).

PARENTS, SUBSIDIARIES AND AFFILIATES

Sigma CJ Associates is a Virginia limited partnership which has no parents, subsidiaries or affiliates. Petula Associates, Ltd. is an Iowa corporation which is a wholly owned subsidiary of Principal Financial Group, Inc. Principal Financial Group, Inc. is a wholly owned subsidiary of Principal Mutual Life Insurance Company. Principal Mutual Life Insurance Company also owns Principal Life Insurance Company and Principal National Life Insurance Company.[1]

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[1] The following entities are affiliates of Petula Associates, Ltd.: Princor Financial Services Corporation; Patrician Associates, Inc.; Principal Development Associates, Inc.; Principal CMO International, Inc.; Invista Capital Management, Inc.; The Principal Financial Group, Inc.; Principal Marketing Services, Inc.; Healthcare Preferred, Inc.; Principal Health Care, Inc.; Principal Casualty Insurance Company; Principal Financial Advisors, Inc.; Delaware Charter Guarantee & Trust Company; EGT Financial Corporation; HMO Iowa, Inc.; and Principal Residential Advisors, Inc.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents, John C. Walsey, Barry S. Blumberg, Sigma CJ Associates, Petula Associates, Ltd., Stanley R. Balderson, Jr., Richard L. Hedrick, Harold S. King and Jack S. Hodge, by counsel, respectfully pray that petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 17, 1987, be denied.

STATEMENT OF THE CASE

HMK Corporation ("HMK") filed this action pursuant to 18 U.S.C. § 1961, *et seq.* ("RICO") in the United States District Court for the Eastern District of Virginia against administrative officials of the County of Chesterfield, Virginia (a political subdivision of the Commonwealth of Virginia, "County"), officials of the Virginia Department of Highways and Transportation (an agency of the Commonwealth of Virginia responsible for

the design, construction and maintenance of public roads, "VDH&T"), and two land development companies and certain of the companies' officers (collectively referred to as the "Boulders Developers"). In its Complaint, HMK alleged that respondents engaged in a single "Scheme to Defraud" the County, the Commonwealth of Virginia and HMK arising out of a dispute over HMK's development plan for a unified area of property in the County (referred to as the "Jahnke-Chippenham Development Area" or "JCDA"). Specifically, HMK alleged that respondents, through the County's local rezoning process, conspired to grant the Boulders Developers certain development advantages which impeded HMK's development plans for its adjacent property in the JCDA. Although this action was the first RICO case brought by HMK relating to the rezoning of the JCDA, it was the thirteenth lawsuit pursued by HMK, or its predecessor corporations, against respondents in which HMK claimed a conspiracy to thwart the public rezoning process so as to interfere with HMK's development opportunity in the JCDA.[2]

In response to HMK's RICO Complaint, respondents filed motions to dismiss and/or motions for summary judgment pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. Respondents' motions raised numerous defenses to HMK's broadly-stated assertions of fraud and conspiracy, including the preclusive effect of HMK's prior lawsuits and the fact that the case involved a single land use dispute between competing developers which could not satisfy RICO's "pattern of racketeering activity" requirement. 18 U.S.C. § 1961(5). Respondents also filed witness affidavits detailing the facts surrounding the rezoning of the JCDA and numerous exhibits including judicial decisions and factual findings from HMK's previously unsuccessful litigation efforts which had concluded that the majority of the allegations in HMK's Complaint were without factual foundation.

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[2] The Court of Appeals apparently treated six of HMK's previous state lawsuits contesting the validity of the rezoning of the JCDA as a single lawsuit since the six suits were ultimately consolidated for trial before the Circuit Court of Chesterfield County. *HMK Corp v. Walsey*, 828 F.2d 1071, 1072 (4th Cir. 1987). The thirteen lawsuits are graphically summarized at Resp. App. 1a-3a.

Respondents' motions were argued before the District Court on May 6, 1986. Based on the voluminous factual record and the application of those facts to the legal principles governing civil RICO claims after *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the court granted summary judgment and dismissed the action, holding, in part, that: (1) HMK was precluded, under the doctrines of *res judicata* and collateral estoppel, from using RICO to relitigate claims and issues already decided against it in previous state and federal lawsuits, and (2) since the land use dispute between the parties over the JCDA constituted only "isolated behavior", under the principles articulated in *Sedima*, "the entire course of conduct between HMK and the defendants does not constitute a RICO pattern," *HMK Corp. v. Walsey*, 637 F.Supp, 710, 712 n.2 (E.D. Va. 1986).

Although HMK asserts in its petition that this case was decided by the District Court in a factual vacuum, the court made numerous factual findings based on the affidavits and exhibits submitted by the parties and applied these findings to HMK's RICO claim to reach its decision granting summary judgment. The trial court's recitation of the facts underlying HMK's RICO claim examines in detail the entire history of the rezoning of the JCDA and the prior lawsuits filed by HMK in which HMK contested each aspect of the JCDA rezoning by claiming a widespread conspiracy by respondents to interfere in the County's rezoning process. *Id.* at 711-14. The District Court noted that in the lawsuits filed by HMK in the Circuit Court of Chesterfield County, the state court, after trial and after "liberal and exhaustive pre-trial discovery," held that the JCDA rezoning decisions were reasonable in all respects and that "the evidence at trial failed to show any impropriety and partiality by the [County's governing body] in rendering its decision." *Id.* at 715. The District Court then found that accusations raised by HMK in its RICO Complaint relating to the rezoning of the JCDA, the acquisition of right-of-way for a public road through the JCDA and the development of a transportation system to serve the JCDA had been raised and decided in prior federal litigation filed by HMK. After its exhaustive review of the facts underlying HMK's RICO action, the District Court concluded that:

> . . . HMK only turned to RICO after failing to obtain favorable decisions in other forums and actions. Indeed, Congress intended civil RICO to be an extraordinary remedy in the fight against organized crime. It was never intended to be a sword of Damocles, held in abeyance until aggressive litigants, having failed in conventional actions, unsheathed the RICO sword in their arsenal for use in yet another lawsuit.

Id. at 724.

Finally, the trial court examined the facts underlying HMK's RICO claim in light of the "pattern of racketeering activity" requirement of RICO. The court first found that regardless of HMK'S conclusory allegations of a broad and continuing conspiracy among respondents, the case involved, at most, isolated behavior concerning a single land use controversy:

> Although the parties have filed voluminous briefs and exhibits detailing the history of this case, the Court finds the case extraordinarily simple. Two developers have crossed swords over a unified section of land so that the advantages given one hamper the aspirations of the other.

Id. at 711. Next, the court adopted the suggestion of this Court in *Sedima* that any meaningful concept of pattern must include the elements of "continuity plus relationship" and concluded that this isolated dispute between two developers battling over a single development opportunity in a unified area of the County could not satisfy the RICO pattern requirement. Accordingly, the court held that HMK's Complaint failed to state a cognizable claim for relief under RICO.[3]

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[3] The court also noted that despite HMK's complaints about mistreatment, the County had actually granted HMK a favorable level of rezoning (allowing densities dramatically higher than those granted the adjacent properties within the JCDA) and had approved an amendment to the County's general land use plan so as to accommodate HMK's proposed development and transportation access plan. *Id.* at 720. By order entered October 30, 1986 in *HMK Corp.* v. *County of Chesterfield*, No. 84-0170-R (E.D. Va 1986), the District Court specifically held that the rezoning of HMK's property was favorable to HMK. Resp. App. 4a.

On appeal, the Fourth Circuit Court of Appeals, affirming the District Court, held that "HMK's allegations in their entirety do not amount to a pattern of racketeering activity." *HMK Corp. v. Walsey,* 828 F.2d 1071, 1073 (4th Cir. 1987). In reaching its decision, the Court of Appeals engaged in a detailed analysis of the RICO pattern requirement after *Sedima.* In particular, the court examined how the concept of pattern in RICO should be applied to the unique factual context of a mixed commercial and political dispute such as the one presented by this case.

Consistent with the approach adopted by other appellate courts analyzing RICO's "pattern of racketeering activity" requirement, the Court of Appeals first addressed this Court's suggestion in *Sedima* that the lower courts "develop a meaningful concept of 'pattern' " in an effort to curb "[t]he 'extraordinary' uses to which civil RICO has been put." *Id.* Citing various appellate decisions examining how the pattern concept should be applied, the court recognized the need to place the pattern concept within the context of all of the circumstances presented in a given case, concentrating on the "nature of the underlying offenses" and the " 'criminal dimension and degree' of the alleged misconduct." *Id.* at 1073-74. The court then examined the facts of the present case and, consistent with the findings of the District Court, found that HMK's Complaint related "merely to the allocation of burdens and benefits in the development of two adjoining properties," and that notwithstanding HMK's attempt to inflate a single local land use dispute into a controversy of RICO proportions, "[n]othing in HMK's allegations sets this development dispute above any other dog-fight between developers." *Id.* at 1075.[4]

[4] In a transparent attempt to force this local land use dispute into the statutory "pattern" requirement of RICO, HMK has now attempted to transform the single "Scheme to Defraud" originally pled in its Complaint into "schemes", "six distinct episodes", "eleven governmental decisions" and "multi-episodic schemes". Pet. App. 4, 5, 8. HMK's new characterization of the nature of its case directly conflicts with the findings, supported by the record, of both the District Court and the Court of Appeals, that the case involves nothing more than a dispute between developers over a single development opportunity.

Finally, the Court of Appeals dissected the allegations constituting HMK's "Scheme to Defraud" in the context of the facts surrounding this local land use controversy. Noting that, under the legislative history of RICO, the statute was not designed to target the isolated offender or to apply to sporadic instances of criminal activity, the court analyzed the totality of the dispute to determine whether HMK's compilation of alleged predicate acts was indicative of wide-spread, pervasive criminal conduct or merely described a single isolated episode whose duration was a function of the manner in which land use decisions are customarily made at the local level. First, the court found that land use decisions necessarily "require the involvement of many governmental decisionmakers at various stages of the approval process" who are required to address "numerous, important, and often competing, interests and concerns." *Id.* at 1074-75. Second, the court noted that public zoning bodies "often proceed deliberately" and that the zoning approval process involves "multiple hearings and opportunity for public comment" which "serve to inform public officials, provide a forum for public opinion, and permit landowners adversely affected by the proposed changes to voice their opposition." *Id.* at 1075. Finally, while the court found that the complexity of local land use procedures "inevitably leads to a protraction of the administrative process," it concluded that such protraction "is a worthwhile price for the benefits of due process and accurate decisionmaking." *Id.*

With these factors in mind, and consistent with the findings of the District Court, the Court of Appeals concluded that HMK's Complaint, despite alleging improper actions by various officials over a period of time, in reality involved nothing more than a routine local zoning dispute between two developers over a single area of land. HMK's attempted elevation of this land use dispute into a RICO controversy by alleging scores of acts committed by public officials was a function of the complexity of the process itself, not a function of "pervasive involvement by a developer in the political process through widespread racketeering activity." *Id.*[5] Since this case involved a dispute

[5] Significantly, the court recognized that HMK had not alleged that respondents had ever interfered in the County's planning process before the JCDA rezoning dispute or had done so since. *Id.* Nor has HMK ever alleged that respondents engaged in any other "Scheme to Defraud" in other locations in the County or in conjunction with other developments.

between developers over a single development opportunity, the court concluded that "the element of 'continuity' necessary for a pattern of racketeering activity under RICO" was lacking and affirmed the District Court's decision granting the respondents' motion for summary judgment. *Id.* In reaching its decision, the Court of Appeals, consistent with the unanimous practice of federal trial and appellate courts since *Sedima,* specifically adopted the "continuity plus relationship" test for establishing a "pattern of racketeering activity" suggested by this Court in *Sedima.* Because this case involved only isolated activity with no threat of the continuing criminal activity RICO was designed to eliminate, the Court of Appeals properly affirmed the District Court's decision.

SUMMARY OF THE ARGUMENT

This Court should deny the petition for a writ of certiorari in the present case. The District Court and the Fourth Circuit appropriately applied the "pattern" concept contained in *Sedima* to properly dismiss a localized zoning dispute. The circuit courts are consistently following this Court's directive in *Sedima* and are formulating a meaningful definition of pattern using the concepts of continuity and relatedness. Certiorari is inappropriate when, as here, a consensus is continuing to develop among the circuits regarding the application of the pattern definition in *Sedima.* Moreover, there is legislation now pending which will codify the pattern test set forth in *Sedima.* The pendency of such legislation enhances the risk that a review of the pattern issue at the present time will be supplanted by subsequent legislative enactment. Finally, the present case serves as an undesirable vehicle to further consider RICO's pattern requirement because the case involves a uniquely mixed political and commercial land use dispute which could limit the applicability of any Supreme Court holding to the peculiar facts of this case.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Are Uniformly Applying This Court's Interpretation Of "Pattern" Under RICO.

In *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n.14 (1985), this Court stated that the term "pattern" under RICO means something more than two acts of racketeering activity.

This Court noted that the legislative history of RICO supports the view that activity which is both isolated and sporadic does not constitute a pattern. This Court also directed lower courts, in deciding whether a pattern of racketeering activity exists, to focus on numerous factors, including whether the activity " 'embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *Id. quoting* 18 U.S.C. § 3575(e). This Court concluded that in order to establish a RICO pattern, the plaintiff must demonstrate that the factor of "continuity plus relationship" combines to produce the pattern of racketeering activity underlying its RICO claim.

Since *Sedima,* the lower courts have uniformly applied the test of "continuity plus relationship" to determine whether a pattern has been pled.[6] Because acts of racketeering activity are typically related, most courts have focused on the "continuity" aspect of the *Sedima* test. Those "[c]ourts generally agree that to make an adequate showing of continuity under *Sedima,* a plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred." *Torwest DBC, Inc. v. Dick,* 810 F.2d 925, 928 (10th Cir. 1987).

A review of the circuit court decisions since *Sedima* reveals that the courts are analyzing the facts of each particular case to distinguish those cases involving only isolated or sporadic criminal activity from those raising a legitimate inference of continuing criminal conduct. For instance, the Seventh Circuit has adopted a factually-oriented standard which focuses on the ongoing nature of the predicate acts. *Morgan v. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). The First, Second, Third, Ninth and Tenth Circuits follow a similar approach. *Roeder v. Alpha Industries, Inc.,* 814 F.2d 22 (1st Cir. 1987); *United States v. Ianiello,* 808 F.2d 184 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 3229 (1987); *Barticheck v. Fidelity Union Bank/First National*

[6] Contrary to petitioner's suggestion that, since RICO's pattern requirement was not central to the *Sedima* decision, this Court has offered little insight into how that term should be interpreted, Pet. 10 n.5, the lower courts have unhesitatingly adopted *Sedima's* analysis to decide pattern questions.

State, 832 F.2d 36 (3d Cir. 1987); *Sun Savings & Loan Association v. Oberdorff*, 825 F.2d 187 (9th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).[7] Consistent with this approach, the Fourth Circuit has "elaborated a case-by-case standard akin to that announced by the Seventh Circuit in *Morgan*." *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987). The existence of a RICO pattern, observed the court, is "a matter of criminal dimension and degree" which cannot be determined by a "mechanical test." *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).[8] The focal point for making that determination is "the threat of continuity of racketeering activity." *Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, No. 87-1520 (4th Cir. October 16, 1987).

An analysis of the circuit court decisions which have addressed RICO's pattern requirement illustrates that the federal appellate courts are uniformly applying the "continuity plus relationship" test announced in *Sedima* and found in the legislative history of RICO.[9] Guided by *Sedima*, the circuit courts are examining the facts of each RICO case and are determining whether those facts fit within *Sedima's* directive that the acts of racketeering activity be continuous and related.

Some of the courts have articulated *Sedima's* pattern requirement using different terms, but not in such a manner as to create the type of "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" that warrants a grant of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). For instance, the Fifth and Eleventh Circuits have found a pattern upon a showing of two or more separate but related predicate acts. *R.A.G.S.*

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[7] The District of Columbia and Sixth Circuits have not yet addressed the pattern issue.

[8] As the Seventh Circuit noted in *Morgan*, a factually-oriented standard is perhaps the fairest and most logical way to apply complex facts to *Sedima's* "continuity plus relationship" test. *Morgan* v. *Bank of Waukegan*, 804 F.2d at 977.

[9] Nothing in the record, or in petitioner's brief, supports petitioner's contention that the lower courts have had difficulty applying the *Sedima* test in criminal cases. Moreover, petitioner's concern that *Sedima's* pattern analysis cannot be applied to an 18 U.S.C. § 1962(b) "takeover" claim is unfounded. *See, e.g., Papai* v. *Cremosnik*, 635 F.Supp. 1402 (N.D. Ill. 1986).

Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985); *Bank of America National Trust & Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986). The Eighth Circuit requires proof that the defendant has engaged in similar activity in the past or is engaged in other criminal activity elsewhere. *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). However, these decisions merely represent diverse applications of the same principle—that alleged criminal activity must show some degree of continuity to support a RICO claim. Even if these articulations could be construed to be at variance with those of other circuit courts, issuance of certiorari would still be inappropriate at the present time since both the Fifth and Eighth Circuits are considering a re-examination of the pattern issue and the adoption of the fact-oriented standard applied generally in the circuits. *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 426 (5th Cir. 1987); *H.J. Inc. v. Northwestern Bell Telephone Co.,* 829 F.2d 648, 650-51 (8th Cir. 1987) (McMillan and Gibson, JJ., concurring).[10]

Regardless of how petitioner chooses to characterize the definition of pattern, the circuit courts are consistently following *Sedima's* directive that RICO's pattern requirement be analyzed in terms of continuity and relatedness. The Fourth Circuit concluded that the dispute in this case did not allege the type of continuous activity sufficient to create a pattern of racketeering activity under RICO. This view is consistent with the consensus that is continuing to emerge among the circuits in considering the application of the pattern concept to RICO claims. Accordingly, this Court should not grant certiorari to review the Fourth Circuit's appropriate analysis of the pattern concept and its conclusion that petitioner failed to allege a valid RICO claim in this case.

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[10] The articulation of the pattern concept by the circuits is a function of the judicious application of the facts of each case to the *Sedima* test and does not present the type of obvious conflict necessarily involved when two courts choose different statutes of limitation or when one court decides that a claim is subject to arbitration and the other decides that it is not.

II. Legislation Currently Pending In Congress Will Codify *Sedima's* "Continuity Plus Relationship" Test For A RICO "Pattern".

HMK asserts in its petition that Congress has no legislation pending which addresses the pattern issue. Pet. 10-11 n.5. Contrary to this assertion, on October 9, 1987, Representative John Conyers (D-Mich) introduced legislation that would clarify the "pattern" requirement of RICO. 133 Cong. Rec. 7406 (daily ed. Oct. 9, 1987 (H.R. 3240)). Bill No. 3240, which was referred the same day to the House Judiciary Committee, is currently awaiting hearings before that Committee's Subcommittee on Criminal Justice. Bill 3240 defines 'pattern' as:

> [A]t least two acts of racketeering activity or fraudulent activity, or both, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (including any period of imprisonment) after the commission of a prior act of racketeering activity or fraudulent activity, or both, that are:
>
> (A) under subsection 1962(c) of this chapter, related to the affairs of an enterprise;
>
> (B) not isolated, but they need not be part of a common scheme or plan; and
>
> (C) except under Section 1962(b) of this chapter, not so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim so that they do not in themselves, in light of the purpose for which they were committed, with reference to the enterprise, or otherwise, give rise to an inference of the possibility of continuity of activity.

H.R. 3240, 100th Cong., 1st Sess. (1987).[11]

Bill 3240's requirement of "multiple episodes" giving rise to "an inference of continuity of activity" will legislatively codify the continuity and relatedness factors discussed by this Court in

[11] Bill 3240 is reproduced in its entirety at Resp. App. 5a.

Sedima and will provide the "meaningful concept of pattern" which the Court found lacking at the time that *Sedima* was decided. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 500 (1985). Professor Blakey recently addressed the constitutionality and necessity of the courts redrafting legislation in the context of the RICO pattern requirement. According to Professor Blakey, "Congress, too, is being pressed both to retain and to circumscribe civil RICO. No indication exists that Congress is unable to fulfill its constitutional role." *Rico Revisited; An Advance Seminar on the Latest Techniques in Civil Suits*, 172-73 (1987). Accordingly, Congress should be given an opportunity to correct any perceived problems associated with the term "pattern."

Review on writ of certiorari is a matter of judicial discretion, not of right. *Sup. Ct. R.* 17.1. "Special and important" reasons are required before a writ of certiorari should be granted. *Id.* Although an alleged conflict among the circuit courts or lack of guidance for lower courts may be considered to be such reasons, these reasons decrease in importance when the enactment of legislation would alleviate the perceived problem. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). The pendency of legislation raises the issue of the appropriateness of the expenditure of this Court's time and resources to decide an issue which the legislature is already taking steps to address. Accordingly, the Court "should not risk inconclusive and divisive disposition of a case when time may further eliminate or completely outmode the issues in dispute". *Id.* at 77. In the present case, as in *Rice*, legislation is currently pending which could eliminate any perceived problem with the term "pattern." Since any decision rendered by this Court on the pattern issue could be rendered moot by Congressional action, this case should not be accepted for review.

III. This Case Presents A Factual Setting Which Is Uncharacteristic Of Most RICO Litigation And Is Unsuitable To Review The Concept of "Pattern" Contained In *Sedima*.

Since the adoption of RICO in 1970, civil RICO litigation has largely involved commercial and securities-related disputes between private parties. Of the 270 district court RICO decisions reported prior to 1984, 77% involved fraud in commercial,

business or securities settings. *Report of the Ad Hoc Civil Rico Task Force of the ABA Section of Corporation, Banking and Business Law* 19 (1985). In contrast, less than one-third of one percent of all civil RICO litigation has involved mixed political and commercial controversies similar to the land use dispute involved in the present case.

According to statistics compiled by the Administrative Office of the United States Courts, a total of 1,709 civil RICO cases were filed in federal court from November, 1985 through June 30, 1987. Yet, the respondents have identified only six civil RICO cases, decided during approximately the same period, which allege fraudulent interference with public processes in a land use or zoning setting. *HMK Corp. v. Walsey,* 828 F.2d 1071 (4th Cir. 1987); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.,* 829 F.2d 1263 (3d Cir. 1987); *Raskiewicz v. Town of New Boston,* 754 F.2d 38 (1st Cir.), *cert. denied,* 474 U.S. 845 (1985); *Naked City, Inc. v. Aregood,* 667 F.Supp. 1246 (N.D. Ind. 1987); *United States Magnet & Alloy Corp. v. Yardley Borough,* No. 86-2898 (E.D. Pa. December 11, 1986); *Verges v. Babovich,* No. 86-2382 (E.D. La. November 28, 1986). Of these six cases, three bear no factual resemblance to the present case since they involve issues unrelated to the public rezoning process or contain allegations of bribery. *Naked City, Inc. v. Aregood* (alleged improper enforcement of a zoning ordinance); *Verges v. Babovich* (alleged misuse of campaign proceeds by a local legislator with a peripheral claim of zoning impropriety); *Town of Kearny v. Hudson Meadows* (bribery of public officials in land development and flood control schemes).[12] These six cases together constitute a mere 0.35% of the RICO actions filed and decided after November 1985, hardly representative of the civil RICO litigation customarily considered by the federal courts. As discussed above, federal courts are increasingly deciding the issue of pattern in reference to the totality of facts and circumstances surrounding a dispute, and are applying the "continuity plus relationship" test of *Sedima* in a decidedly fact-oriented manner. Accordingly, any consideration of pattern in

[12] In contrast to the "typical" public corruption case, HMK has never alleged, and the record contains no facts to support, even an inference of bribery of public officials.

the context of the atypical facts presented here—a local zoning fight of importance solely to the parties in this case—would have limited value when applied by lower courts to the usual "garden variety" RICO action involving commercial or securities disputes.

In addition, further judicial review of this land use controversy conflicts with the principle that federal courts do not sit as "super zoning boards of appeals." *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982) *quoting Village of Belle Terre v. Boraas,* 416 U.S. 1, 12 (1974) (Marshall, J. dissenting). *Raskiewicz v. Town of New Boston, supra; Albery v. Reddig,* 718 F.2d 245, 249 n.7 (7th Cir. 1983). As determined by the Court of Appeals in the present case, the suit filed by HMK, despite its RICO label, is in fact nothing more than a collateral attack on legislative decisions that rezoned a developing area of the County and that have already been judicially determined to be appropriate. As such, the court, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977), held that it was inappropriate for a federal court to delve into the County's rezoning decisions, and that doing so would "effect the wholesale transfer of that most basic of local controversies into a federal forum." *HMK Corp. v. Walsey,* 828 F.2d 1071, 1076 (4th Cir. 1987). Given the understandable reluctance of federal courts to become involved in local land use disputes and the fact that respondents' actions relating to the JCDA rezoning controversy have already been examined in depth in multiple lawsuits filed by HMK, this case is not appropriate for further judicial review.

CONCLUSION

For each of the foregoing reasons, respondents, John C. Walsey, Barry S. Blumberg, Sigma CJ Associates, Petula Associates, Ltd., Stanley R. Balderson, Jr., Richard L. Hedrick, Harold S. King and Jack S. Hodge, by counsel, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

HISTORY OF HMK LITIGATION INVOLVING JCDA

ASE	Dunning and M.K. Realty v. Board of Supervisors Boulders	M.K. Realty ROD Corp. and HMK Corp. v. Board of Supervisors, Planning Commission, Balderson, Micas and Boulders	P.H. Corp. and HMK Corp. v. Board of Supervisors and Boulders	ROD Corp. and HMK Corp. v. Board of Supervisors, Planning Commission, Balderson, Micas and Boulders	ROD Corp. v. Board of Supervisors and Boulders
OURT	State	State	State	State	
ATE LED	November 1982	August 1983	August 1983	August 1983	
LAIM	Challenged Call tract rezoning and zoning amendment in JCDA	Alleged a conspiracy to adopt General Plan 2000 for JCDA Challenged first Sigma amendment to favor Boulders at HMK's expense	Challenged amendment to zoning as a taking of Chesterfield Village Apartments in JCDA	Alleged conspiracy to approve General Plan 2000 for JCDA to favor Boulders at expense of HMK	
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	
ISPOSITION	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Ct. denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Non-suit April 1984	Continued on next page

HISTORY OF HMK LITIGATION INVOLVING JCDA

CASE	ROD Corp. v. Board of Supervisors and Boulders	HMK Corp. v. Board of Supervisors	P.H. Corp. v. Balderson, Hodder, & Prudential	P.H. Corp. v. Balderson, Hodder & Forge-O'Connell Properties	HMK CORP. v. Board of Supervisors
COURT	State	State	State	State	
DATE FILED	November 1983	November 1983	March 1985	April 1985	
CLAIM	Challenged Sigma II zoning in JCDA	Challenged denial of 1st HMK CUPD application in JCDA	Challenged conditions of Pru-Care zoning in JCDA	Challenged Fidelity Building as being in violation of zoning in JCDA	
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	
DISPOSITION	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Judgment in favor of all defendants June, 1984; appeal to Virginia Supreme Court denied October 1985	Non-suit December 1985	Non-suit December 1985	Continued on next page

HISTORY OF HMK LITIGATION INVOLVING JCDA

CASE	**HMK Corp.** v. **Board of Supervisors**	**Commonwealth of Virginia** v. **HMK, et al.**	**HMK Corp.** v. **Board of Supervisors and Hedrick**	**HMK Corp.** v. **County of Chesterfield and King**	**HMK Corp.** v. **Boulders, Hedrick, Balderson, King and Hodge**
COURT	State	State	Federal	Federal	Federal
DATE FILED	April 1985	April 1985	April 1984	November 1984	January 1986
CLAIM	Challenged conditions imposed on HMK office rezoning south of Jahnke Rd. in JCDA	VDH&T sought acquisition of property for road purposes through eminent domain process; HMK claims condemnation as culmination of conspiracy	Challenged conditions in proposed contract with County to design alternate access road for HMK's property in JCDA	Alleged a conspiracy to condemn HMK property for private use of Boulders and to thwart normal zoning procedure in JCDA	RICO claim; racketeering activities involving development decisions affecting property of Boulders in JCDA
	Damage alleged	Damage alleged	Damage alleged	Damage alleged	Damage alleged
DISPOSITION	Non-suit 1985	Continuance obtained by HMK pending result of federal litigation with County County & Boulders	Contract provision declared invalid; damages awarded of $4,911	Case dismissed by Court August 1985 on grounds of ripeness and inability to claim conspiracy damages	Summary judgment granted on behalf of defendants Affirmed by Fourth Circuit Court of Appeals

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 84-0170-R

HMK CORPORATION
Plaintiff,

v.

COUNTY OF CHESTERFIELD,
Defendant.

FINAL ORDER
(Filed October 30,1986)

This matter is before the Court on the defendant's motion for summary judgment on plaintiff HMK's "phasing" damages claim. Based on Judge Warriner's March 29, 1985 opinion and the plaintiff's acknowledgment therein that if it received favorable zoning there would be no damages, the Court GRANTS defendant's motion for summary judgment. Since HMK did receive favorable zoning, even though not to the extent desired, under the law of the case as established by Judge Warriner, there can be no damages. Plaintiff HMK's claim for damages is hereby DISMISSED WITH PREJUDICE and JUDGMENT IS ENTERED for the defendant as to the "phasing" damages issue, the sole remaining claim in the case.

While the plaintiff cannot show phasing damages, HMK is the prevailing party for purposes of recovering its costs in this action, based on Judge Warriner's previous rulings. Therefore, the Clerk is DIRECTED to assess against the defendant the plaintiff's costs of action.

Let the Clerk send a copy of this order to all counsel of record.

October 30, 1986 /s/ RICHARD L. WILLIAMS
DATE UNITED STATES DISTRICT JUDGE

100TH CONGRESS
1ST SESSION

H. R. 3240

To amend chapter 96 of title 18, United States Code, relating to racketeering influenced and corrupt organizations, to create a new offense for fraudulent activity, and to restructure the civil claims procedures.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 9, 1987

MR. CONYERS (for himself and MR. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 96 of title 18, United States Code, relating to racketeering influenced and corrupt organizations, to create a new offense for fraudulent activity, and to restructure the civil claims procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Racketeer Influenced and Corrupt Organizations Act of 1987".

SEC. 2. NEW OFFENSE FOR FRAUDULENT ACTIVITY.

(a) NEW PREDICATE OFFENSES.—Section 1961 of title 18, United States Code, is amended by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) 'racketeering activity' means (A) any act involving murder, kidnapping, prostitution involving minors, gambling, arson, robbery, bribery, extortion, dealing in obscene

matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: chapter 51 (homicide), chapter 73 (obstruction of justice), and chapter 110 (sexual exploitation of children), section 32 (relating to destruction of aircraft facilities), section 81 (relating to arson), section 112 (relating to protection of foreign officials and other persons), section 115 (relating to assaults and other acts against Federal and other persons), section 201 (relating to bribery), section 215 (relating to bank bribery), section 224 (relating to sports bribery), section 373 (relating to solicitation to commit a crime of violence), sections 471, 472, and 473 (relating to counterfeiting), section 511 (relating to forgery of State and other securities), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is a felony, section 664 (relating to embezzlement from pension and welfare funds), section 666 (relating to theft or bribery in benefit programs), section 831 (relating to prohibited transactions involving nuclear material), section 844 (relating to explosive materials), section 875 (relating to interstate communications), section 876 (relating to mailing threatening communications), section 877 (relating to mailing threatening communications from foreign countries), section 878 (relating to threats), section 891-894 (relating to extortionate credit transactions), section 929 (relating to restricted ammunition), section 1084 (relating to the transmission of gambling information), section 1203 (involving hostage taking), section 1362 (relating to communications lines), section 1363 (relating to buildings), section 1364 (relating to foreign commerce), section 1365 (relating to energy facility) sections 1461-1465 (relating to obscene matter), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1952A (relating to murder-for-hire), section 1952B (relating to violent crime in aid of racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia),

section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1992 (relating to trains), section 2277 (relating to vessels), sections 2314 and 2315 (relating to interstate transportation of stolen property) except for an act indictable under the second undesignated paragraph of section 2314, sections 2318 and 2320 (relating to counterfeit materials), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); (D) any act which is indictable under the Controlled Substances Act (21 U.S.C. 951 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 801 et seq.); or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;".

(b) DEFINITION OF FRAUDULENT ACTIVITY.—Section 1961 is further amended by—

(1) redesignating paragraphs (2) through (10) as paragraphs (3) through (11), respectively; and

(2) inserting after paragraph (1) the following:

"(2) 'fraudulent activity' means (A) any act which is indictable under any of the following provisions of title 18, United States Code: section 510 (relating to fraud of the Treasury or other securities), section 1029 (relating to fraud in connection with access devices), section 1030 (relating to fraud in connection with computers), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to bonds fraud), the second undesignated paragraph of section 2314 (relating to scheme to defraud involving transportation of stolen goods and other items); (B) any act which is indictable involving fraud under title 11 (relating to bankruptcy); or (C) any act which is indictable involving fraud under the

Securities Act of 1933 (15 U.S.C. 77x), the Securities Exchange Act of 1934 (15 U.S.C. 78ff), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80b-17), the Commodity Exchange Act (7 U.S.C. 13), or Truth in Lending Act (15 U.S.C. § 1644);".

(c) MODIFICATION OF PROHIBITED ACTIVITIES.—Section 1962 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) in the first sentence by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or";

(B) in the second sentence by striking out "any pattern or racketeering activity or" and inserting in lieu thereof "any pattern of racketeering activity or any pattern of fraudulent activity, or both, or";

(2) in subsection (b) by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or"; and

(3) in subsection (c) by striking out "or" after "racketeering activity" and inserting in lieu thereof "or a pattern of fraudulent activity, or both, or".

(d) CRIMINAL PENALTIES.—Section 1963 of title 18, United States Code, is amended in paragraph (a)(3) by inserting after "racketeering activity" the following: "or fraudulent activity, or both,".

SEC. 3. DEFINITION OF PATTERN.

Paragraph (6) of section 1961 of title 18, United States Code, as redesignated by section 2(b) of this Act, is amended to read as follows:

"(6) 'pattern' means at least two acts of racketeering activity or fraudulent activity, or both, one of which occurred

after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity or fraudulent activity, or both, that are—

"(A) under subsection 1962(c) of this chapter, related to the affairs of an enterprise;

"(B) not isolated, but they need not be part of a common scheme or plan; and

"(C) except under section 1962(b) of this chapter, not so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim so that they do not in themselves, in light of the purpose for which they were committed, with reference to the enterprise, or otherwise, give rise to an inference of the possibility of continuity of activity;".

SEC. 4. CRIMINAL AND CIVIL SANCTIONS.

(a) CRIMINAL SANCTIONS.—Section 1963 of title 18, United States Code, is amended by striking out "both," and inserting in lieu thereof "both; if death results, any term of years or for life;".

(b) CIVIL REMEDIES.—Section 1964 of title 18, United States Code, is amended to read as follows:

"§ 1964. Civil remedies

"(a) In any civil action or proceeding instituted under this section, the district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter, shown by a preponderance of evidence, by rendering an appropriate judgment or decree, including—

"(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

"(2) imposing reasonable restrictions on the future activities or investments of any person, including prohibiting

any person from engaging in the same type of endeavor as the enterprise engaged in or the activities of which affect interstate or foreign commerce;

"(3) ordering dissolution or reorganization of any enterprise, making the due provision for the rights of innocent persons; or

"(4) taking such other action as may be just.

"(b)(1) The Attorney General may institute a proceeding under subsection (a) of this section.

"(2) Pending final determination of a proceeding instituted by the Attorney General under subsection (a) of this section, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as might be just.

"(c)(1) Any person may institute a proceeding under subsection (a) of this section.

"(2) In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage, including the possibility that any judgment for money damages might be difficult to execute, in other cases, but no showing of special or irreparable injury shall have to be made.

"(3) Upon the execution, in the discretion of the court, of a proper bond against damages for an injunction improvidently granted, a temporary restraining order and a preliminary injunction may be issued in any proceeding under subsection (a) of this section before a final determination of it upon its merits. Such undertaking shall not be required when the applicant is a State or territory of the United States.

"(4) If the person who brings a proceeding under subsection (a) of this section substantially prevails, his recovery shall include the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(d) Whenever the United States is, directly or indirectly, injured in its business or property by reason of any violation of

section 1962 of this chapter, the Attorney General may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages, shown by a preponderance of evidence, sustained by it, and if the United States substantially prevails, the costs of the action, including the costs of investigations and litigation.

"(e)(1) Any person who is, directly or indirectly, injured—

"(A) in his person by a crime of violence, or

"(B) in his business or property by reason of any violation of section 1962 of this chapter, may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages, shown by a preponderance of evidence, sustained by him, and if the person who brings the action under this subsection substantially prevails, the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(2) Damages recovered under this subsection shall not be limited to competitive or distinct injury.

"(f) If the court determines that the filing of any pleading, motion, or paper under subsection (c) or (e) of this section was frivolous or that any action or proceeding was brought or continued under subsection (c) or (e) of this section in bad faith, vexatiously, wantonly, or for an improper or oppressive reason, it shall award treble the actual costs of the action or proceeding including a reasonable attorney's fee in the trial and appellate courts, unless the court finds that special circumstances, including the relative economic position of the parties, make such an award unjust.

"(g) Upon the filing of a civil action or proceeding under subsection (c) or (e) of this section, the person filing the action or proceeding shall immediately notify the Attorney General in such manner as the Attorney General shall direct by regulations. The United States may, upon timely application, intervene in any civil action or proceeding brought under subsection (c) or (e) of this section, if the proceeding is of general public importance. In such action or proceeding, the United States shall be

entitled to the same relief as if it had instituted the action or proceeding.

"(h)(1) Notwithstanding any other provision of law providing a shorter period of limitation, any civil action or proceeding under subsection (c) or (e) of this section, shall be barred unless it is commenced within five years after the unlawful conduct terminated or the cause of action otherwise accrued, whichever is later.

"(2) Whenever any civil action or criminal action or proceeding is brought or intervened in by the United States to prevent, restrain, sanction, or punish any violation of section 1962 of this chapter, the running of the period of limitations provided in this subsection with respect to any cause of action arising under subsection (c) or (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years after the pendency of such action.

"(i)(1) Notwithstanding any other provision of law, any civil action or proceeding brought under subsection (c) or (e) of this section, the underlying elements of which constitute fraudulent activity, by any person, other than any attorney general under subsection (1) of this section or a State or unit of local government, shall be subject to the procedures of chapter 1 of title 9 (relating to arbitration).

"(2) Any claim resolved under the procedures of chapter 1 of title 9 (relating to arbitration) under this subsection shall preclude the parties to such claim as to issues and claims decided in such arbitration if—

"(A) the party seeking to use issue or claim preclusion could not have jointed the previous proceedings;

"(B) the party against whom issue or claim preclusion would apply had incentive to fully litigate the issue in the prior proceeding;

"(C) there have been no inconsistent rulings on the issue in prior actions or proceedings; and

"(D) there are no new procedural opportunities available to the precluded party in the second action or proceeding or, if there are, they are not likely to cause a result different from that of the first action or proceeding.

"(j)(1) No action or proceeding may be brought under subsection (c) or (e) of this section by a person, if the elements of the pattern of fraudulent activity involve primarily—

"(A) domestic relations;

"(B) products liability;

"(C) decedents estates; or

"(D) a landlord-tenant dispute.

"(2) No action or proceeding may be brought under subsection (c) or (e) of this section by a person in connection with and during a labor dispute.

"(3) For the purposes of this subsection—

"(A) 'domestic relations' means divorce, separation, custody, support, or adoption;

"(B) 'products liability' means the liability of manufacturers or sellers to compensate buyers, users, or others for any damages suffered because of manufacturing or packaging defects in goods sold;

"(C) 'labor disputes' means any controversy concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange the terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee;

"(D) 'decedents estates' means will, bank account trusts, testamentary trusts, revocable trusts that become irrevocable upon death of grantor, or intestate succession; and

"(E) 'landlord-tenant disputes' means any dispute concerning the terms of fulfillment of a contract arising out

of the relation where one person occupies the premises of another with his permission in subordination to the other's interest in the premises.

"(k)(1) Notwithstanding any other provision of law, any pleading, motion, or other paper filed by a person in connection with an action or proceeding under subsection (c) or (e) of this section shall be verified. Where the person is represented by an attorney, the pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated. Where such pleading, motion, or other paper includes an averment of fraud, coercion, agency, respondent superior, accomplice, or conspiratorial liability, it shall state, insofar as practicable, the circumstances with particularity.

"(2) The verification by a person and the signature by an attorney required by this subsection shall constitute a certification by the person or attorney that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that—

"(A) it is well grounded in fact;

"(B) it is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and

"(C) it is not made for any bad faith, vexatious, wanton, improper or oppressive reason, including to harass, to cause unnecessary delay, to impose a needless increase in the cost of litigation, or to force an unjust settlement through the serious character of the averment.

"(3) If a pleading, motion, or other paper is verified or signed in violation of the certification provisions of this subsection, the court, upon motion or upon its own initiative, shall, after a hearing and appropriate findings of fact, impose upon the person who verified it or the attorney who signed it, or both, a fit and proper sanction, including treble the actual costs of the proceeding or action under subsection (f) of this section.

"(l)(1) Notwithstanding the provisions of subparagraphs (A), (B), (C), and (D) of paragraph (1) of subsection (j) of

this section, any attorney general of a State may bring an action or proceeding under subsection (c) or (e) of this section in the name of the State, as parens patriae, on behalf of individuals residing in the State, in an appropriate United States district court. The court shall exclude from the amount of monetary relief awarded in the action or proceeding any amount of monetary relief—

"(A) which duplicates amounts which have been awarded for the same claim; or

"(B) which is properly allocable to natural persons who have excluded their claims pursuant to this subsection and any business entity.

"(2)(A) In any action or proceeding brought under this subsection, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice of it to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court may direct further notice to such person according to the circumstances of the case.

"(B) Any person on whose behalf an action or proceeding is brought under this subsection may elect to exclude from adjudication the portion of the State claim for monetary or other relief attributable to him by filing notice of such time as specified in the notice given under this subsection.

"(C) Any final judgment or decree in any action or proceeding under this subsection shall preclude any issue or claim under subsection (c) or (e) of this section by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given under this subsection.

"(3) Any action or proceeding under this subsection shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

"(4) In any action or proceeding under this subsection—

"(A) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

"(B) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, frivolously, vexatiously, wantonly, or for an improper or oppressive reason.

"(5) For purposes of this subsection, the term 'state attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under subsection (c) or (e) of this section and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

"(A) a contingency fee based on a percentage of the monetary relief awarded under this subsection; and

"(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under this subsection.

"(m) A final judgment or decree rendered in favor of the United States in any civil action or criminal action or proceeding in favor of the United States or any plaintiff or a defendant in any civil action or proceeding shall preclude the plaintiff or defendant in any subsequent civil action or proceeding as to all issues or claims respecting which the judgment or decree would preclude an issue or claim between the parties to it.

"(n)(1) The court may award under this section, upon the motion made after verdict, simple interest on actual damages for the period beginning on the date of service of the pleading setting forth a cause of action under this section and ending on the date of verdict, or for any shorter period, if the court finds that the award of interest for the period is just.

"(2) In determining whether an award of interest under this section for any period is just the court shall consider—

"(A) whether the opposing party, or either party's representative, filed pleadings, made motions, or filed other papers so lacking in merit as to show that such party or representative acted in bad faith, vexatiously, wantonly, or for an improper or oppressive reason;

"(B) whether, in the course of the proceeding or action involved, the opposing party, or either party's representative, violated any applicable rule, statute or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

"(C) whether the opposing party, or either party's representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost of the litigation; and

"(D) whether the award of such interest is necessary to compensate the opposing party for the injury sustained by him.

"(o)(1) An action or proceeding under this section shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(2) An action or proceeding under this section shall survive and be enforceable against a receiver in bankruptcy, but only to the extent of actual damages or other relief."

(c) VENUE AND PROCESS.—Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b), by striking out "residing in any other district";

(2) in subsection (b), by striking out "in any judicial district of the United States by the marshall thereof." and inserting in lieu thereof "anywhere the party may be found";

(3) in subsection (c), by striking out "in any other judicial district" and inserting in lieu thereof "anywhere the witness is found";

(4) in subsection (c), by striking out "in another district"; and

(5) in subsection (d), by striking out "in any judicial district in which" and inserting in lieu thereof "where".

SEC. 5. COSTS OF PROSECUTION AND INVESTIGATION.

Section 1918 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Upon conviction in a court of the United States for an offense in chapter 96 of title 18, the court may order the defendant pay the costs of investigation and prosecution. Amounts collected under the preceding sentence shall be covered into miscellaneous receipts of the Treasury.

"(2) As used in this subsection, the term 'costs of investigation' includes—

"(A) attorney, investigator, and auditor salaries and expenses;

"(B) special contract costs and special purchases;

"(C) travel costs and witness fees; and

"(D) grand jury fees and other related costs of investigation."

SEC. 6. SENSE OF CONGRESS.

It is the sense of the Congress that the National Association of Attorneys General form a State RICO committee that will promulgate advisory guidelines on the use of section 1964 of title 18, United States Code, by State and local units of government that will seek to assure, among other relevant factors, that it—

(1) is used—

(A) with restraint;

(B) selectively;

(C) uniformly;

(D) only where necessary adequately to reflect or reach the nature and extent of the unlawful activity involved; and

(E) with due regard for limited Federal judicial resources; and

(2) is not used—

(A) routinely; or

(B) to create a bargain tool where its use would otherwise be inappropriate.

SEC. 7. CONSTRUCTION DIRECTIVES.

Chapter 96 of title 19, United States Code, shall not be construed—

(1) to prohibit a person from constituting an enterprise, or a part thereof, and a defendant in the same count of an indictment or a complaint;

(2) to require in a criminal or civil proceeding or action the showing of economically motivated conduct or a mercenary motive;

(3) to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government;

(4) to permit the showing of an enterprise by no more than a showing of a pattern of racketeering or fraudulent activity, or both;

(5) to require a showing that each person named as a defendant in a criminal or civil proceeding or action commit, or agree to commit, personally the minimum number of acts required to constitute a pattern; or

(6) to permit a showing of criminal responsibility or civil liability without a showing of a state of mind other than that required for the offenses included in the pattern of racketeering or fraudulent activity, or both.

SEC. 8. CONFORMING AMENDMENTS.

(a) The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

(b) Section 1962(d) of title 18, United States Code, is amended by striking out "subsections" and inserting in lieu thereof "subsection".